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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1020

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ, et al.,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Marshall Winokur and Rae Winokur, Abe Brodsky and Celia Brodsky, and Ethelle Katz and Bertha Katz, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 2, 1977, affirming the district court's dismissal of their individual actions as moot by reason of the defendants' voluntary cessation of the conduct complained of and the defendants' tender to plaintiffs of the individual monetary damages sought,

and further holding that the Court of Appeals, therefore, had no jurisdiction under Article III of the Constitution to review the earlier order of the district court denying certification to the putative plaintiff class.

Plaintiffs' Petition for Rehearing *en banc* was denied on October 21, 1977, with one judge favoring *en banc* rehearing and submitting a statement in dissent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, filed August 2, 1977, is reported at 560 F.2d 271 (7th Cir. 1977), and appears herein at A-1. The order denying the Petition for Rehearing *en banc*, entered October 21, 1977, together with dissenting statement, is reported at 562 F.2d 1034 (7th Cir. 1977), and is appended hereto at A-13.

The United States District Court for the Northern District of Illinois rendered its final order dismissing the action as moot on March 21, 1975. This opinion is unreported and appears at A-15.

Previously, the District Court had rendered an interlocutory order denying plaintiff class certification on October 17, 1972. That opinion, reported at 58 F.R.D. 178 (N.D. Ill. 1972), appears at A-18. Appeal of the order denying plaintiff class status was dismissed by the United States Court of Appeals for the Seventh Circuit in an order dated May 18, 1973, which is unreported and appears at A-26. A petition for writ of certiorari filed with the Supreme Court of the United States seeking review of dismissal of the interlocutory appeal was denied on June 3, 1974. 417 U.S. 930 (1974).

JURISDICTION

The order of the Court of Appeals of which review is sought was entered August 2, 1977 and a timely petition for rehearing with suggestion for *en banc* rehearing was denied on October 21, 1977.

Certiorari jurisdiction is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that a defendant can deprive the Court of Appeals of jurisdiction to review the correctness of the district court's denial of class action status simply by offering to the named plaintiff class representatives the small amounts of their individual monetary claims?

2. Did the court below err in adopting a rule of law which permits a defendant to moot the claims of the putative class by voluntarily offering to the named plaintiff class representatives, at any time prior to certification of the class, the relief requested by such class representatives in their individual capacities?

3. Did the court below err in holding that plaintiffs would not be entitled to an award of counsel fees on the ground that no monetary fund had been created by plaintiffs' litigation for the benefit of others?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT OF THE CASE

This case was filed as a class action and plaintiffs' motions to certify both plaintiff and defendant classes were presented at an early stage of the proceedings. In their complaint the plaintiffs alleged that the defendants (federally chartered savings and loan associations in the Chicago Metropolitan area) solicited savings deposits by falsely representing to the public that dividends equivalent to "daily compound interest" would be paid on deposits. Plaintiffs asserted that the defendants' advertising was false and misleading because it did not disclose that defendants actually calculated interest in a manner such that earnings were not accrued, or were forfeited, with respect to withdrawals of money prior to the last day of any calendar quarter. Plaintiffs further alleged that the advertising was also false and misleading because the defendants omitted any disclosure that deposits made after the 10th day of any month did not earn any interest until the first day of the following month (although they did widely advertise that deposits made by the 10th earned from the first day of the month). In what was apparently an attempt to meet the competition of certain other local savings and loan associations which actually compounded interest on a daily basis, defendants employed misleading advertising asserting that they too paid "daily compound interest," whereas in fact they did not do so.

Plaintiffs alleged that the foregoing omissions were material to rational investment decisions and, since savings and loan association accounts are "securities" within the meaning of Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (*Tcherep-*

nin v. Knight, 389 U.S. 332 (1967)), defendants had violated Section 10(b) of that Act and Rule 10(b)-5 promulgated thereunder by the Securities and Exchange Commission (17 C.F.R. § 240.10b-5). Jurisdiction was grounded upon Section 27 of the Securities and Exchange Act of 1934 (15 U.S.C. § 78aa) and is not dependent upon the amount in controversy.

The plaintiffs' complaint sought (i) injunctive relief, (ii) monetary damages, (iii) plaintiff class status, (iv) defendant class status, and (v) an award of costs and expenses, including counsel fees. The individual monetary claims of the named class representatives have been conceded by plaintiffs to be no greater than $12 each, as calculated from passbook entries and interest tables. Nevertheless, the combined claims of the putative plaintiff class members unquestionably amount to many hundreds of thousands of dollars.

On October 17, 1972, the district court denied certification to the plaintiff class. The court ruled that whether each class member had read defendants' advertisements and thus been misled posed individual questions. The district court disclaimed any need to decide the extensively briefed question as to whether such reliance would serve to defeat plaintiff class status. Instead, the court posited a new concept,—"individual materiality,"—and concluded that the common question requirement of Rule 23(a)(2) of the Federal Rules of Civil Procedure was lacking. A-22-23.

The district court subsequently denied plaintiffs' motion for 28 U.S.C. § 1292(b) certification of the order refusing certification of the plaintiff class and plaintiffs then attempted an appeal based upon the "collateral order" and "death knell" doctrines. On May 18, 1973, the Court of Appeals rejected the "death knell" doctrine and

dismissed the appeal. A-26. This Court denied plaintiffs' petition for writ of certiorari. 417 U.S. 930 (1974).*

Thereafter, plaintiffs attempted to resume pretrial discovery proceedings with respect to the still pending individual claims, but prosecution of the case was interrupted when defendants tendered $12 to each of the named plaintiffs (all of whom refused the offer) and moved to dismiss the action as moot. On March 21, 1975, the district court granted that motion (A-15), noting that if the case presented a proper class action "a different conclusion would have to be reached as to mootness." In so dismissing the case the trial court first determined that plaintiffs were not entitled to the injunction sought by them because the defendants had ceased their errant practices, and further held, without a hearing, that plaintiffs were not entitled to an award of counsel fees.

Plaintiffs filed timely notice of appeal on April 18, 1975, challenging the court's denial of class certification for both plaintiff and defendant classes, and also the district court's determination that plaintiffs were not entitled to injunctive relief or counsel fees. Plaintiffs urged (a) that the individual claims were not mooted, and (b) that if the action was held on appeal to have been properly brought as a plaintiff class action then mooting of the named class representatives would not in any event render the entire cause moot.

The Court of Appeals for the Seventh Circuit affirmed that the individual claims of the named plaintiffs had

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* The district court had earlier denied plaintiffs' motion for certification of the defendant class in an order entered March 27, 1972. That order was not the subject of an interlocutory appeal.

been mooted, and concluded, therefore, that it had no jurisdiction to review the district court's denial of plaintiff or defendant class certification. A-8-12. The actual judgment of the Court of Appeals was: "The judgment appealed from, dismissing the action because it is moot, is AFFIRMED."

The refusal of the Court of Appeals to consider the correctness of the class status denial because of defendants' offer to pay the nominal damages incurred by the named plaintiffs, and the defendants' voluntary cessation of the conduct complained of, means that the plaintiffs have been twice frustrated in their efforts to obtain judicial review of the district court's denial of class certification.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER MOOTING OF THE CLAIM OF THE INDIVIDUAL CLASS REPRESENTATIVE AFTER DENIAL OF CLASS CERTIFICATION DEPRIVES THE COURT OF APPEALS OF JURISDICTION TO REVIEW THE DENIAL OF CLASS ACTION STATUS.

In its opinion below (A-1), the Court of Appeals for the Seventh Circuit readily acknowledged that its holding in the instant case is in conflict with the Sixth Circuit's opinion in *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1201 (6th Cir. 1974), wherein the Court expressly held that a mooting of the named plaintiff's claim by voluntary act of the defendant did not deprive the appellate tribunal of jurisdiction to review and reverse the district court's denial of class status.

The result reached by the Court of Appeals in the instant case also conflicts with that reached by the Ninth Circuit in *Workman v. Mitchell*, 502 F.2d 1201, 1207-8 (9th Cir. 1974). In *Workman* the court reversed the district court's denial of class certification in the face of defendant's contention that a case or controversy had ceased to exist by reason of the mooting of the claims of the individual named plaintiffs,—in part as a consequence of voluntary actions taken by defendants.

The decision below also appears in conflict with that of the Fifth Circuit in *Satterwhite v. City of Greenville, Texas*, 557 F.2d 414 (5th Cir. 1977), wherein that court rejected an Article III challenge to its jurisdiction to review the district court's denial of class status notwithstanding that the named plaintiff's individual claim had

subsequently become moot by virtue of an adverse judgment on the merits, affirmed on appeal. (The conflict between the instant case and *Satterwhite* is brought into sharp focus by Judge Gee's dissent in *Satterwhite*. The rationale of that dissenting opinion closely parallels the opinion of the Seventh Circuit in this case.)

In summary then, the opinion below is in conflict with positions taken by the Fifth, Sixth and Ninth Circuits.* On the other hand, the Seventh Circuit position appears consistent with that adopted by the Eighth Circuit in *Bradley v. Housing Authority of Kansas City, Missouri*, 512 F.2d 626 (8th Cir. 1975). Thus, on the important issue posed by the decision below (See Point II *infra*), the Circuit Courts of Appeal are split 3-2.

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* Arguably, also, the opinion below is in conflict with the rationale expounded by the Tenth Circuit in the course of its opinion in *Napier v. Gertrude*, 542 F.2d 825, 826 (10th Cir. 1976), *cert. denied*, ... U.S. ....., 97 S.Ct. 759 (1977). While that court did hold the action before it to be moot, it apparently did so only because the substantive issue was not one "capable of repetition, yet evading review." The court expressly states that mootness will not occur where the failure to certify the class is *attributable to trial court error*, and the error is correctable at the appellate level. (542 F.2d, at pp. 826-27).

II.

THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION BECAUSE A RULE BY WHICH DEFENDANT CAN VOLUNTARILY AND UNILATERALLY MOOT THE CLAIMS OF THE PUTATIVE PLAINTIFF CLASS BY OFFERING RELIEF ONLY TO THE NAMED CLASS REPRESENTATIVE PRIOR TO CLASS ACTION CERTIFICATION, AND WHICH ALSO PRECLUDES APPELLATE REVIEW OF THE DISTRICT COURT'S DENIAL OF CLASS CERTIFICATION, IS VIOLATIVE OF FUNDAMENTAL FAIRNESS AND THE POLICY UNDERLYING RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. The Decision Below, If It Is Allowed To Stand, Will Effectively Destroy The Class Action In The Seventh Circuit:

"Proposition 2", as propounded by the Seventh Circuit, is as follows (A-11; 560 F.2d 271, 277):

> "2. When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action."

If "Proposition 2" is a correct statement of the law, then Rule 23 of the Federal Rules of Civil Procedure will be reduced to a virtually meaningless relic. Any well advised defendant, immediately upon receipt of summons in a putative class action, will offer to the named plaintiff the full amount of his individual claim (typically amounting to only a few dollars) or, where non-monetary relief is prayed for on behalf of the class, will grant that relief to the named plaintiff alone, and then move immediately to dismiss the action on grounds of mootness.

In the Seventh Circuit, at least, the trial judge will perforce be required to grant that motion, for there will have been no determination that the action can be maintained as a class action, the controversy between the named plaintiff in his own interest and his opponent will have died, and hence court adjudication will not be appropriate for want of a case or controversy.

Even if, as in the instant case, the defendant is inexplicably slow in taking advantage of his prerogative so that the district court does rule on class certification before the named plaintiff is mooted, all is not lost. If the decision is against class status, then that decision, whether correct or not, is forever immune from appellate review—provided only that the defendant comes to his senses and makes a tender to the named plaintiff before the entry of judgment on the merits and before the reviewing court has had an opportunity to rule upon the class action order.* Further, any effort to keep the case alive through the intervention of additional named plaintiffs is also bound to fail. Defendants

* In a circuit which has adopted the so-called "death knell" doctrine, a defendant who desires to moot the case will be required to make his tender prior to the time that the Court of Appeals actually rules upon the appeal from the order denying class certification. In a circuit, such as the Seventh, which has rejected the death knell doctrine (*King v. Kansas City Southern Industries, Inc.*, 479 F.2d 1259), defendant will be able to moot the entire action by tender to the named plaintiff at any time prior to the district court's rendition of final judgment on the merits. This Court has recently granted certiorari in *Coopers & Lybrand v. Livesay*, No. 76-1836, *Punta Gorda Isles, Inc. v. Livesay*, No. 76-1837, and *Gardner v. Westinghouse Broadcasting Co.*, No. 77-560. If the ultimate disposition of those cases should result in the establishment of a uniform death knell requirement in all circuits that would by no means eliminate the problem raised by the decision below. Its only consequence would be to somewhat shorten the time within which defendant can make his tender.

will simply pick off each new class representative as he or she appears on the scene.

The harshness of this result was readily apparent to Judge Swygert in his dissent from the denial of the Petition for Rehearing *en banc* in this cause (A-14; 562 F.2d 1034):

> "I am unable to subscribe to a rule which insulates from appellate review a decision denying class certification solely because a defendant tenders a few dollars to a putative class representative . . . The unfortunate consequence of the rule formulated in this decision on future consumer class actions are plain: defendants in such actions are now given the arbitrary power to bar appellate review by simply tendering the damages claimed by the putative class representative. Rather than go to trial and face the potential payment of damages which might be assessed in a class suit, defendants will pay off the named plaintiff or plaintiffs thereby mooting the entire case. I think justice dictates that the right to judicial review should not be denied under the circumstances."

If a holding of mootness serves to deprive the court of appeals of jurisdiction to review a denial of class certification —even though the mootness holding is itself premised on an erroneous class action ruling—we have a Catch-22 situation which forever denies to the putative plaintiff class the right to judicial review. This result is all the more anomalous when viewed in light of the fact that a district court order *granting* class certification will always be reviewable at the behest of the defendant, either immediately (in a circuit which has adopted the death knell doctrine) or after judgment on the merits.

The startling import of the decision below comes into sharp focus when one reflects upon a case such as *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The long

and tortured history of that famous lawsuit is set forth at some length in the course of this Court's opinion (417 U.S., at pp. 160-169). Over a period of nearly eight years, the case wended its way up and back through the federal court system, including three trips to the Court of Appeals, until its more-or-less final dénouement in this Court. During the pendency of that suit many thousands of hours, perhaps tens of thousands of hours, of high priced legal talent were expended in its prosecution and defense, to say nothing of vast amounts of judicial time and expertise devoted to unraveling its multi-faceted complexities. Yet, if the Seventh Circuit is correct, all of that time, energy and money were spent needlessly. What the defendants in *Eisen* should have done, preferably as soon as the case was filed but in any event promptly after the initial denial of class certification (41 F.R.D. 147), was to offer Mr. Eisen his $70 and then move to dismiss the action on grounds of mootness. Although the *Eisen* defendants were represented by a battery of experienced and prestigious counsel, it apparently occurred to none of them that their clients' problems were susceptible of so simple a solution.

The court of appeals decision in the instant case has inevitably opened the floodgates to a rash of tenders to named plaintiffs followed by motions to dismiss for mootness in class action cases pending in the Seventh Circuit wherein a class has not yet been certified or in which certification has been denied and appeal thereof is awaiting final disposition of the individual claim on the merits. Presumably all of those motions to dismiss will be granted in due course on the authority of the opinion below. To the knowledge of Petitioners' counsel, at least one such order of dismissal has already been entered, and a copy thereof is appended to this Petition at A-28.

If the decision below is allowed to stand, the plaintiff class action will be all but extinguished in the Seventh Circuit—those which seek injunctive relief or declaratory relief as well as those seeking monetary damages—for the only class action which can make its way over the barrier imposed by "Proposition 2" is the rare one in which the size of the individual claim is large enough to warrant litigation in its own right by both plaintiff and defendant. Ironically, it is that very category of case which has the least need for the class action device. The underlying rationale of Federal Rule 23 is to provide a forum for the "small guy" who would otherwise be effectively deprived of all remedy.*

B. By Permitting Defendant To Moot The Class Through A Voluntary And Unilateral Tender To The Named Class Representative, The Court Below Reached A Result Contrary To The Overwhelming Weight Of Authority:

Long before this Court rendered its opinions in *Sosna v. Iowa*, 419 U.S. 393 (1975), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), lower courts, both state and federal, and commentators as well, had expressed serious concern about the possibility of defendants employing the Article III case or controversy requirement (or comparable provisions in state constitutions) as a device for picking off class action plaintiffs one-by-one—the "revolving door" technique.

The problem was well articulated by the California Supreme Court in *La Sala v. American Savings and Loan Ass'n*, 5 Cal.3d 864, 873, 489 P.2d 1113, 1118 (1971):

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* Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 299 (1966), quoting Professor Ben Kaplan, Reporter for the Advisory Committee which drafted new Rule 23.

> "If other borrowers bring a class action, [defendant] may again waive as to those representative borrowers, and again move to dismiss the action. Such a procedure could be followed ad infinitum for each successive group of representative plaintiffs. If defendant is permitted to succeed with such revolving door tactics, only members of the class who can afford to initiate or join litigation will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs. Yet the function of the class action is to avoid the imposition of such burdens upon the class and upon the court."

In the pre-*Sosna* era, federal courts had consistently rejected mootness arguments advanced by class action defendants who had voluntarily given the named plaintiff all the relief he asked for. See, *e.g.*, *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968); *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, 375 F.2d 648, 657 (4th Cir. 1967); *Smith v. YMCA of Montgomery*, 462 F.2d 634, 645 (5th Cir. 1972) ("Subsequent remedial actions allegedly taken to obviate a cause of action strongly mitigate (sic) against a finding of mootness . . ."); *Vaughan v. Bower*, 313 F. Supp. 37, 40 (D. Ariz. 1970) (3-Judge Court), *aff'd summarily*, 400 U.S. 884 (1970) ("defendant cannot, by his own voluntary conduct, moot the case and thereby deprive the Court of jurisdiction . . . What is involved here is a problem 'capable of repetition, yet evading review.' "); *Kelly v. Wyman*, 294 F. Supp. 887, 890 (S.D. N.Y. 1968); *aff'd sub nom. Goldberg v. Kelly*, 397 U.S. 254 (1970).

Contemporary commentators approved the results of these cases. Bledsoe, *Mootness and Standing In Class Actions*, 1 Fla. St. U. L. Rev., 430, 444 (1973); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke Law J. 573, 600 (1974).

Subsequent to this Court's opinions in *Sosna* and *Gerstein*, lower courts have continued to recognize that the ability of a defendant to voluntarily moot out the named plaintiff is a crucial factor in determining whether or not the claim is one "evading review" or whether it is unlikely that the Court can rule on the class certification motion before the claim becomes moot. See, *e.g.*, *Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975); *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977); *Basel v. Knebel*, 551 F.2d 395, 397 (D.C. Cir. 1977); *Senter v. General Motors Corp.*, 532 F.2d 511, 519-20 (6th Cir. 1976); *Langson v. Simon*, 74 F.R.D. 456, 460 (N.D. Ill. 1977); *Tedeschi v. Blackwood*, 410 F. Supp. 34, 38 (D. Conn. 1976); *Robinson v. Leahy*, 73 F.R.D. 109, 114, n. 4 (N.D. Ill. 1977); *Custom v. Trainor*, 74 F.R.D. 409, 412 (N.D. Ill. 1977).

C. The Court Below Erred In Its Interpretation Of Recent Decisions Of This Court:

Petitioners respectfully suggest that the Court of Appeals for the Seventh Circuit has misread the import of those recent decisions of this Court which have begun to interpret Article III justiciability requirements in the context of class actions. This Court has established criteria for determining the existence of a "live controversy" after the individual claims of the named plaintiffs have been mooted, and those criteria extend well beyond the narrow exception designated as "Proposition 3" by the court below, *i.e.*, where the trial court decides the substantive claim on its merits.

In *Sosna v. Iowa*, 419 U.S. 393, 402, n. 11 (1975), this Court recognized that there would be at least *some*

circumstances under which class certification could be said to "relate back" so that mooting of the named plaintiff's claim prior to such certification would not necessarily moot the case as to the class itself. This exception to the usual rule of mootness was applied in *Gerstein v. Pugh*, 420 U.S 103, 110, n. 11 (1975). It is quite true that both *Sosna* and *Gerstein* seem to place considerable emphasis on the question of whether the district court could reasonably be expected to reach the certification motion before the individual claim becomes moot, whereas in the instant case the district court did in fact rule on that motion before the purported mooting occurred. Yet, even if *Sosna* and *Gerstein* are viewed as being this narrow in scope, they still go well beyond Proposition 2 as propounded by the court below, for Proposition 2 admits of *no* escape from mootness, with the single exception of a situation where the district court has decided the substantive claim on its merits.

In any event, Petitioners do not believe that such a restrictive interpretation of this Court's views is warranted. *Gerstein* itself refers to additional factors—the "constant existence of a class of persons suffering the deprivation," and the probability that the members of the class will be adequately represented by plaintiff's counsel. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 754-55 (1976), this Court determined that the test of Article III justiciability was whether a "live controversy" remains at the time the case is reviewed. Such a live controversy is present when the unnamed members of the class are entitled to the relief already afforded the named class representative and thus have a personal stake in the outcome of the controversy. In *Franks*, of course, the class had been certified by the district court. But the class members' personal stake in the outcome would have been no less present if the

district court had erroneously denied certification. The unnamed members of the class can hardly be deprived of their status as class members by virtue of an erroneous lower court ruling, and so long as they remain class members they have a personal stake in a live controversy. This is precisely the approach taken by the Fifth Circuit in *Satterwhite v. City of Greenville, Texas*, 557 F.2d 414, 418 (5th Cir. 1977):

> "Here, the district court denied certification of the class action. The plaintiff representatives in *Sosna* and *Franks* did not face this additional problem. . . . Thus, it would appear that our first inquiry in facing the case or controversy issue should be *whether the district court's refusal to certify was proper*. . . ." (Emphasis added)

Petitioners respectfully suggest that the Fifth Circuit has correctly interpreted the pronouncements of this Court, whereas the Seventh Circuit was evidently led astray by a misreading of *Indianapolis School Commr's v. Jacobs*, 420 U.S. 128 (1975), and *Weinstein v. Bradford*, 423 U.S. 147 (1975), the two holdings which it thought "require affirmance of the case before us."

Weinstein v. Bradford is clearly not in point. Although originally brought as a class action, the denial of class certification had not been appealed by the plaintiff. Consequently, by the time the case reached this Court it was not treated as a class action: "The instant case, *not a class action*, clearly does not satisfy the latter element." (423 U.S., at p. 149. Emphasis added) The mooting of the individual claim necessarily required dismissal of the case inasmuch as there was no reasonable expectation that the plaintiff would again be subjected to the same unlawful actions by the defendant.

Jacobs can be read to impose a highly restrictive rule as to the continued existence of a case or controversy

under Article III, notwithstanding the logical inconsistency between such a reading and the later statement by this Court in *United Airlines, Inc. v. McDonald*, ... U.S. ....., 97 S.Ct. 2464, 2469 (1977), that denial of class status is subject to review at the behest of the named plaintiff after final judgment on the merits. (See Point III *infra*). Plaintiffs suggest, however, that a more plausible interpretation of *Jacobs* is the one embraced by the Tenth Circuit in *Napier v. Gertrude*, 542 F.2d 825, 827 (10th Cir. 1976), *cert. denied*, ... U.S. ....., 97 S.Ct. 759 (1977).

> "In *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975), the Supreme Court confronted a case which had become moot as to the named plaintiffs. The district court had treated the suit as a class action but had failed to comply with the certification requirements of Rule 23(c). The Supreme Court held the action moot without considering a remand to allow proper certification. *The Court did not rule, however, that mootness removed its power to remand, and it does not appear that the failure to certify the class action was assigned as error as it is here.*" (Emphasis added)

This interpretation of *Jacobs*, incidentally, is joined in by Chief Judge Seitz in his concurring opinion in *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 218, n.5 (3d Cir. 1977), *cert. granted*, ... U.S. ....., 46 U.S.L.W. 3365 (1977).

Subsequent decisions make it clear, petitioners suggest, that this Court does not view *Jacobs* as presenting an impenetrable barrier to appellate review of the trial court's denial of class action certification after mooting of the individual plaintiff. In *East Texas Motor Freight System, Inc. v. Rodriguez*, ... U.S. ....., 97 S.Ct. 189 (1977), sufficient justiciability was present to allow this

Court to review (and affirm) denial of class status even though the individual claim had been mooted by an adverse judgment on the merits which had not been appealed. And *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 753-54 (1976), indicates rather clearly that the outcome of *Indianapolis School Comm'rs v. Jacobs* turned upon a lack of standing, rather than want of Article III justiciability.

III.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

A. The Import Of *United Airlines, Inc. v. McDonald:*

In *United Airlines, Inc. v. McDonald*, ... U.S. ....., 97 S.Ct. 2464, 2469 (1977), this Court stated that a district court's refusal to certify a plaintiff class "was subject to appellate review after final judgment at the behest of the named plaintiffs, as United concedes." Clearly this means that the named plaintiff, after recovering a judgment for the full amount of his individual claim, can appeal the district court's earlier denial of class action certification.* Logically, it must also mean that a named

* The individual plaintiffs in *McDonald* had recovered a favorable judgment in the court below. Furthermore, a narrower interpretation of the quoted sentence could hardly explain the strong dissent of three justices of this Court appearing at 97 S.Ct. 2473. Three of the cases cited by the Court's majority in support of the statement (97 S.Ct., at p. 2469, n.14) did involve appeals of class certification denials after plaintiff had been awarded judgment on the merits of his individual claim. *Share v. Air Properties G. Inc.*, 538 F.2d 279 (9th Cir. 1976); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. den.* 394 U.S. 928 (1969); *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973). See also *Cameron v. E.M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976); *Gelman v. Westinghouse Electric Corp.*, 556 F.2d 699, 701 (3d Cir. 1977); *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209 (3d Cir. 1977), *cert. granted*, ... U.S. ....., 46 U.S.L.W. 3365 (1977).

plaintiff, having received the relief requested in his own behalf without judgment as a consequence of defendant's unilateral actions, is equally entitled to the same appellate review.

The court below read *McDonald* in the narrowest possible manner as creating only a very limited exception to what it understood to be the general rule laid down by this Court in *Indianapolis School Commissioners v. Jacobs*, 420 U.S. 128 (1975), and *Weinstein v. Bradford*, 423 U.S. 147 (1975). That general rule, as understood by the Seventh Circuit, appears as "Proposition 2", at 560 F.2d 271, 277 (A-11):

> "2. When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action."

In its opinion below, the Seventh Circuit necessarily paid homage to the *McDonald* holding in its "Proposition 3", 560 F.2d, at p. 277 (A-11). Nevertheless, it drew a distinction between that situation—i.e., where the trial court "decides the claim on its merits", and the situation actually before it—i.e., where the controversy between the named party in his own interest and his opponent "dies".

This distinction is clearly untenable. Whether the case or controversy as between the named plaintiff and the defendant "dies" by virtue of a voluntary tender, or whether it "dies" by virtue of the recovery of a judgment after trial on the merits, cannot logically have any bearing upon the appealability of the order denying class action status. Indeed, the recovery of a judgment for the full amount sought would appear to be the very essence

of mootness, —the extinguishment of the case or controversy.* If the recovery of that judgment does not preclude an appeal of the class action denial (as it does not under *McDonald*), then *tender* of the full amount sought certainly should not preclude such an appeal.

B. The Seventh Circuit's Opinion Is Contrary To The Teaching Of This Court In *Sprague v. Ticonic National Bank* And *Mills v. Electric Auto-Lite Co.* And Has Severely Curtailed The Substantial Benefit Doctrine.

Plaintiffs claimed an award of fees to their counsel for the substantial benefit conferred by institution of the litigation and the defendant's correction of the practices of which complaint was made. The district court denied such compensation without a hearing suggested by the plaintiffs presumably on the ground that no statute authorized such an award. A-16

The court of appeals affirmed the denial of a fee award, or the possibility of such an award, on the ground that a party must have recovered a fund for the benefit of others in order to be eligible to petition for a fee award. Based upon this erroneous premise, the Court of Appeals reasoned that the defendants might conceivably have satisfied the plaintiffs' claim for relief by correcting their advertising to reflect their actual interest-paying practices rather than by commencing payment of daily compound interest so as to bring their payment practices into line with their advertising. Thus, the Court of Appeals reasoned that since a fund might not have been created by plaintiff's efforts (although in

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* As to this point, the Court's attention is particularly directed to the thoughtful analysis by Chief Justice Seitz contained in his concurring opinion in *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 214 (3d Cir. 1977), *cert. granted*, ... U.S. ....., 46 U.S.L.W. 3365 (1977).

fact a substantial benefit was conferred) plaintiffs are not entitled to counsel fees.

The requirement of the creation of a common fund as a prerequisite to an award of fees imposed by the court of appeals is incorrect, contrary to prior opinions of this Court, a backward step in the development of the law and, if allowed to stand, a serious impediment to the assertions of claims by many parties—whether or not in the form of the class action. Even if the defendants had remedied the situation by correcting their advertising rather than paying daily compound interest, plaintiffs are entitled to a fee award.

The error of the court of appeals is clearly demonstrated by the following quotation from *Mills v. Electric Auto-Lite Co.*,396 U.S. 375 (1970), at p. 392-93.

> "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses. '[T]he foundation for the historic practice of reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.' *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939). This Court in *Sprague* upheld the District Court's power to grant reimbursement for a plaintiff's litigation expenses even though she had sued only on her own behalf and not for a class."

Footnote 17, appended to the above quotation (396 U.S., at p. 392), reads as follows:

> "See *Trustees v. Greenough*, 105 U.S. 527, 531-537 (1882); *Central R. R. & Banking Co. v. Pettus*, 113 U. S. 116 (1885); Hornstein, The Counsel Fee in Stockholder's Derivative Suits, 39 Col. L. Rev. 784 (1939).
>
> Even in the original 'fund' case in this Court, it was recognized that the power of equity to award fees was not restricted to the court's ability to provide reimbursement from the fund itself: 'It would be very hard on [the successful plaintiff] to turn him away without any allowance . . . . It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses, which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.' *Trustees v. Greenough*, 105 U.S., at 532."

The more recent opinion of this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), is in no way inconsistent with *Mills*. Indeed, *Alyeska Pipeline* specifically reaffirms the vitality of the substantial benefit doctrine with the observation that "[t]hat rule has been consistently followed." (421 U.S., at p. 257-58.)

This Court's supervisory powers should be exercised to correct the misconception of the court below.

CONCLUSION

For all of the foregoing reasons, this Court should allow its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1469

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Plaintiffs-Appellants,

v.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 1177—**William J. Bauer** and **Joel M. Flaum**, *Judges.*

ARGUED JANUARY 6, 1976—DECIDED AUGUST 2, 1977

Before FAIRCHILD, *Chief Judge*, PELL, *Circuit Judge*, and EAST, *Senior District Judge.**

FAIRCHILD, *Chief Judge.* The plaintiffs appeal from the judgment of the district court, dismissing this case on the ground of mootness. In addition, they seek review of two orders of the district court denying their motion for

* The Honorable William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

maintenance of this action as a class action, with both plaintiffs and defendants representing classes. The plaintiffs' cause of action was based on the § 10b-5 liability of sellers for untrue statements and omissions of material facts necessary to make statements made not misleading in connection with the sales of securities, § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j and Rule 10(b)(5) of the Rules of the Securities and Exchange Commission, 17 C.F.R. § 240.10-5. Jurisdiction was predicated on 15 U.S.C. § 78aa. The securities involved are savings accounts in savings and loan associations. See *Tcherepnin v. Knight*, 389 U.S. 332 (1967). It seems simpler in the context of this case to use the terms accounts, deposits, withdrawals, and interest, rather than purchase and sale of shares, and dividends.

I

The gravamen of the appellants' amended complaint consists of an allegation that the plaintiffs, Marshall and Rae Winokur, Abe and Celia Brodsky, and Ethelle and Bertha Katz, as depositors with defendants, Bell Federal Savings and Loan Association (Bell), Home Federal Savings (Home), and Uptown Federal Savings and Loan (Uptown), relied to their detriment on certain untrue statements in and omissions from advertisements put out by the defendants in describing the interest defendants would pay to depositors. The plaintiffs sought damages, a permanent injunction against the deceptive advertising, and attorneys' fees.

Defendants' relevant practices in the period covered by the complaint were apparently as follows: As of the close of any calendar quarter, defendants credited interest on funds then on deposit, to the extent of the full months during the quarter these funds had been on deposit, except that funds deposited within the first ten days of a month were treated as if they had been on deposit for that full month. When interest earnings were credited, they were computed as if compounded daily.

Defendants advertised their accounts and included representations (1) that interest was compounded daily and (2) that deposits made by the tenth earn from the first.

The theories on which the representations were claimed to be violations of Rule 10b-5(b), and therefore deceptive devices under § 10(b) of the 1934 Act were in substance:

(1) The representation that interest was compounded daily implied that interest would be credited with respect to any one or more days funds remained on deposit, and was untrue, or at least, in order not to be misleading, made it necessary to state that interest in any quarter would not be credited on funds which were withdrawn before the close of the quarter.

(2) The representation that deposits made by the tenth earn from the first implies that the general rule, from which this is an exception, is that interest begins to accrue on the date of deposit, rather than that interest begins to accrue on the first of the month on or after the date of deposit; and that this representation, in order not to be misleading, made it necessary to state that funds deposited after the tenth of a month would not begin to earn interest until the first of the next month.

Although the amended complaint states that plaintiffs represent all other holders, similarly situated, of savings accounts in named defendants (as well as in the members of like associations similarly situated in the Chicago area), plaintiffs ultimately proposed a class consisting of persons who withdrew funds before the close of a quarter, and thereby did not receive interest, and persons who deposited funds after the tenth of a month and therefore did not receive interest for the balance of the month. Thus the proposed class was defined in terms of those who could demonstrate injury in those particular ways.

Plaintiffs sued individually and as representatives of the class. Defendants were sued individually and as representatives of all other federally chartered savings and loan institutions located in the Chicago metropolitan area and similarly situated.

The district court first addressed the question whether the action was to be maintained as a class action against the named defendants as representatives of a defendant class. The court decided that the class was not so numerous as to make joinder of all members impracticable. Moreover, noting the differences in advertisements and practices among defendants, the court decided that there were not questions of law or fact common to the proposed defendant class. Accordingly, in 1972, the court denied plaintiffs the right to maintain the action against the class.

Several months later, in 1972, the court denied plaintiffs the right to maintain the action on behalf of a class. The court noted the differences in the advertisements, the question whether a depositor had read them, the question whether deposits had been made in person and what representations were made at that time, the availability of further information in the passbook, and the question whether each depositor gained and relied on misconceptions as a result of the representations and omissions in the advertising. The court concluded that the questions of fact varied almost on an individual basis, with material variation in the representations made and in the kinds or degrees of reliance by the depositors. Similarly, the court was of the opinion that the claims of the named plaintiffs were not typical of the claims of the class. The court noted that the two plaintiffs who were depositors in defendant Home made no deposits after the tenth of any month, and admitted they knew the policy actually followed by defendant Home. Thus these plaintiffs did not rely on misconceptions generated by either of the challenged omissions.

The complaint was filed May 18, 1970, and alleged advertising commencing July 1, 1969. Each named plaintiff had been a depositor for a number of years and had made earlier deposits and withdrawals not claimed to have been induced by deception. It was apparently plaintiffs' theory that each time a deposit was made after the tenth of a month after July 1, 1969, he relied upon the advertising for a belief that interest would be credited immediately, and each time a depositor made a withdrawal after July 1, 1969, other than at the close of

a quarter, he relied upon the advertising for a belief that interest would be credited to the date of withdrawal.

Plaintiffs would isolate the questions whether the omissions left the advertisements misleading and whether there was scienter and treat them as questions common to the class (predominating over questions affecting only individual members). We assume the district court had in mind the normal course of dealing over a period of time between a depositor and a savings and loan association (different from the transactions of purchases and sales of more conventional securities) and the probability that regular depositors became familiar with interest practices through experience in deciding that it would be difficult and largely unproductive to isolate questions concerning the effect of the challenged advertising, as questions common to the class.

After unsuccessful attempts at obtaining a pronouncement under 28 U.S.C. § 1292(b) on which leave to appeal could be sought, plaintiffs filed a notice of appeal from the determination that the action not be maintained as a class action. This court dismissed the appeal by unreported order, holding the order not appealable, citing *Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *Hackett v. General Host Corp.*, 455 F.2d 618 (3rd Cir. 1972), *certiorari denied* 407 U.S. 925; *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972); *Jumps v. Leverone*, 150 F.2d 876 (7th Cir. 1945). *Certiorari* was denied. 417 U.S. 930 (1974).

See also Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir. 1976), *certiorari denied* 429 U.S. 907; *Jenkins v. Blue Cross Mut. Hospital Ins., Inc.*, 538 F.2d 164, 166, footnote 2 (7th Cir. 1976).

Thereafter the district court dismissed the action for mootness. As recited in the opinion of the court, "Plaintiffs seek damages, costs, attorneys' fees, and injunctive relief. Defendants assert, and plaintiffs concede, that defendants have tendered to plaintiffs the claimed damages ($12 per plaintiff) and costs, and that attorneys' fees are not authorized by statute." It is conceded that defendants have changed their interest credit-

ing practices so that the representations complained of are now accurate beyond question. Thus plaintiffs were found no longer to have any stake in a controversy over the allegedly misleading nature of defendants' advertisements.

II

Mootness of the Claims of the Named Plaintiffs

Plaintiffs do not challenge the adequacy of the amount tendered by defendants to cover their individual losses, and court costs. A favorable decision on the merits will bring them no greater amount of money.

Plaintiffs do contend that they have a stake in resolution of the merits because an injunction will protect them from future injury.

Plaintiffs are correct in asserting that the mere cessation of illegal conduct does not necessarily render a case moot. But, on the other hand, the "necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953). A case becomes moot where "there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945). Defendants were successful in convincing the district court of their continuing intention to maintain clear consistency between their interest policies as represented in advertising and in actual practice. Ironically, plaintiffs assisted them in so persuading the court.

In the early stages of this litigation (1971) the district court stayed the proceedings pending the outcome of an application to The Federal Home Loan Bank Board. The court reasoned that because of the Board's authority over savings and loan advertising, a finding by the Board would be useful to the court. Plaintiffs moved for reconsideration, and filed an affidavit showing that defendants had changed their practice of crediting interest so that it conformed to plaintiffs' interpretation of

the advertising. The plaintiffs appeared to accept the fact that the past practices were changed so as to conform and were unlikely to reoccur. The affidavit (March 3, 1971) stated:

> "Affiant is informed and believes that these named Defendants now truly compound interest daily, with no forfeitures for mid-quarterly withdrawals and no forfeitures with respect to deposits made after the tenth of the month. With these changes, it is believed that all of the activities complained of involving these Defendants have now been corrected. As the Court pointed out . . . the Board cannot award damages; the Board's principal remedy . . . is the issuance of cease and desist orders. . . . Nothing remains for the Board to consider over which it has authority to fashion any remedy. As for current practices, the evils complained of have been cured. As for the past, only this Court can provide an appropriate remedy by way of damages."

Plaintiffs have produced no evidence of any change in this situation since 1971. As stated by the district court, a suggestion that defendants might resume the earlier practices is much too speculative and unlikely to support a live controversy. *See United States v. Oregon Medical Society*, 343 U.S. 326, 333 (1952); *Berg v. LaCrosse Cooler Co.*, 548 F.2d 211, 213 (7th Cir. 1977). Therefore the district court correctly concluded there was no cognizable danger of recurrent violation. There being no occasion for an injunction, even if plaintiffs achieved a favorable decision on the merits, the fact that plaintiffs originally sought an injunction will not provide plaintiffs with a stake in the controversy over the merits.

Finally, plaintiffs contend that if the merits were decided in their favor, they would be entitled to attorneys' fees. The district court noted that plaintiffs concede that attorneys' fees are not authorized by statute. On appeal they contend that if the merits were decided in their favor, they would fall within one of the exceptions, again recognized by the Supreme Court in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975), to the general rule against attorneys' fees.

They rely, in part, on an exception when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." *F.D. Rich Co. v. U.S. for use of Indus. Lumber Co.*, 417 U.S. 116, 129 (1974). The pleadings as well as the record during the course of the proceedings suggest no possible basis for an allowance on that theory. They also rely on an exception when a party has recovered a fund for the benefit of others in addition to himself, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1969). Although the change in defendants' practices in 1971 resulted in greater allowances of interest than some depositors may have had if the old practices had continued, plaintiffs' lawsuit could equally have resulted in defendants' continuing the practices but inserting additional statements in the advertisements to obviate plaintiffs' objections to them. Again, we are satisfied that there would so clearly be no occasion for an allowance of attorneys' fees, even if plaintiffs achieved a favorable decision on the merits, that plaintiffs seeking attorneys' fees will not provide plaintiffs with a stake in the controversy over the merits.

III

The Effect of Mootness on Review of the Denial of Maintenance as a Class Action

The district court observed that if the action were maintained as a class action, the case would not be moot because of the interests of members of the class, notwithstanding mootness as to the claims of named plaintiffs. Plaintiffs seek our review of the orders denying maintenance as a class action. They contend that these orders were erroneous, and since they could not be reviewed earlier under the views in this circuit, they must be reviewable now, and reversal of at least the denial of maintenance of the action on behalf of a plaintiff class would restore a live controversy, since members of the plaintiff class would have a damage award at stake.

Our reading of recent decisions of the Supreme Court, however, leads to the conclusion that since plaintiffs' individual claims are now moot, and plaintiffs have not

been authorized to represent other class members, the action lacks a live controversy. There being no live controversy, the appellate court cannot exercise jurisdiction, even to reverse the class action determination and thus instill a live controversy into the action.

In *Sosna v. Iowa*, 419 U.S. 393, 403 (1975), the Supreme Court decided that a class action did not become moot when, after judgment and pending appeal, the individual interest in the controversy of the named plaintiff expired. There remained a live controversy in which members of the plaintiff class still had an interest. The Court deemed it significant that the named plaintiff litigated the question in a representative capacity, and that the unnamed members of the class had, at the time of certification of the class, acquired a legal status separate from the interest asserted by the named plaintiff.

Similarly, in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752 (1976) the Supreme Court held that the phase of a properly certified class action which was brought up on *certiorari* was not moot because the named plaintiff had ceased to have any interest in that phase of the controversy. A sufficient adversary relationship obtained, however, as to unnamed class members in the phase of the controversy considered by the Court.

Although the situation in *Sosna* had been found to present claims capable of repetition yet evading review, the *Franks* Court made it plain that this situation need not be present to avoid mootness where the named plaintiff in a properly certified class action no longer has a personal stake in the outcome, but class members do. 424 U.S. at 754.

In *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128 (1975), the Supreme Court was informed at oral argument that the named plaintiffs no longer had any interest in the matter in controversy. "The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rules Civ. P. 23, a controversy still exists between [defendants] and the present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review." 420 U.S. at

129. (Citing *Sosna*.) Because no class action determination had been adequately made, the judgments of the lower courts were vacated, with instructions to dismiss the complaint.

In *Weinstein v. Bradford*, 423 U.S. 147 (1975), maintenance as a class action had been denied. By the time the case reached the Supreme Court, plaintiff had ceased to have a personal interest in the matter in controversy, and his claim was not deemed capable of repetition yet evading review. There being no class action, the judgment below was vacated and instructions given to dismiss the complaint. 423 U.S. at 149.

The holdings in *Jacobs* and *Weinstein* require affirmance in the case before us. In both those cases, named plaintiffs had brought suit individually and on behalf of a class. In *Jacobs* the class determination was inadequate and in *Weinstein* it was denied. When the interests of the named plaintiffs disappeared, those plaintiffs were not before the court in a representative capacity, and it was decided that it was immaterial whether unnamed members of the class which named plaintiff had initially sought to represent might have interests at stake in a controversy with defendant. In *Sosna* and *Franks*, on the other hand, the actions had been ordered maintained as class actions, and thus the named plaintiff represented unnamed class members who had personal interests in the controversy.

Several other cases have been decided in this area. In *Kremens v. Bartley*, [..... U.S. ....., 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977)] a statutory change had rendered the claims of named plaintiffs and of a great portion of the certified class of unnamed persons moot, but left the controversy alive with respect to many other class members. The Supreme Court vacated the judgment of the district court, but did not order dismissal. Rather, it directed reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims.

Two other recent decisions did not involve assertion of mootness: *East Texas Motor Freight System, Inc. v. Rodriguez*, [..... U.S. ....., 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)] and *United Air Lines, Inc. v. McDonald*, [.....

U.S. ....., 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).] *McDonald* bears indirectly on our case. There the district court denied maintenance as a class action. When contrary to expectations, named plaintiffs did not seek review of the denial by appeal from the final judgment, a member of the proposed class who had relied on named plaintiffs to appeal promptly sought to intervene and to appeal. It was held that the intervention was timely. Named plaintiffs could have obtained appellate review by appeal from the final judgment, and the intervening member of the proposed class could appeal.

It seems to us that the following four generalizations are consistent with the decisions referred to:

1. When, after an action is ordered maintained as a class action, the controversy between the named party in his own interest and his opponent dies, court adjudication of the merits remains appropriate because the interests of class members are sufficiently represented by the named party so that controversy between the class members and the opponent is still alive and being litigated in the action.

2. When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.

3. When the right to maintain a class action is denied and the trial court decides the claim on its merits the named party who is still interested in a live controversy, and who sought to represent the class, is deemed to have standing to seek review of the denial.

4. In situation 3 a member of the proposed class may promptly intervene and have standing to seek review of the denial even if the named party elects not to seek review.

Our case fits proposition 2 and not 3. We note a 1974 decision of the Sixth Circuit to the opposite effect, preserving the issue of maintainability of a class action,

which had been denied, past the time the named plaintiffs' personal claim became moot and permitting correction on appeal. *Weathers v. Peters Realty Corporation*, 499 F.2d 1197, 1201 (6th Cir. 1974). Such a rationale may well be desirable, but we think it does not survive *Jacobs* and *Weinstein*. See *Valentino v. Howlett*, 528 F.2d 975, 979 (7th Cir. 1976).

The judgment appealed from, dismissing the action because it is moot, is AFFIRMED.

AFFIRMED.

APPENDIX B

Marshall WINOKUR and Rae Winokur, Abe Brodsky and Celia Brodsky, and Ethelle Katz and Bertha Katz, Plaintiffs-Appellants,

v.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, Home Federal Savings and Uptown Federal Savings and Loan Association of Chicago, Defendants-Appellees.

No. 75-1469.

United States Court of Appeals,
Seventh Circuit.

Oct. 21, 1977.

ON PETITION FOR REHEARING.

(Opinion Aug. 2, 1977, 7 Cir. 1977, 560 F.2d 271).

Before FAIRCHILD, Chief Circuit Judge, SWYGERT, CUMMINGS, PELL, TONE and WOOD, Circuit Judges, and EAST, District Judge.*

ORDER

On consideration of the petition for rehearing, all the judges on the original panel have voted to deny rehearing.

The majority of the judges in regular active service have voted to deny rehearing en banc.

Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable William G. East, United States District Court for the District of Oregon, is sitting by designation.

(Footnote continued on following page)

* *continued*

Circuit Judges Sprecher and Bauer did not participate in the consideration of this matter. Judge Swygert voted to grant the rehearing *en banc* and accompanied his vote with the attached statement.

I am unable to subscribe to a rule which insulates from appellate review a decision denying class certification solely because a defendant tenders a few dollars to a putative class representative. In this case, the district court denied certification of a plaintiff class. Plaintiffs' attempt to obtain interlocutory judicial review of the decision was unsuccessful. The defendants then tendered $12.00 to each of the named plaintiffs and the district court dismissed the suit on grounds that the case was moot. On appeal, this court refused for a second time to review the propriety of the order denying class certification.

The unfortunate consequences of the rule formulated in this decision on future consumer class actions are plain: defendants in such actions are now given the arbitrary power to bar appellate review by simply tendering the damages claimed by the putative class representative. Rather than go to trial and face the potential payment of damages which might be assessed in a class suit, defendants will pay off the named plaintiff or plaintiffs, thereby mooting the entire case. I think justice dictates that the right to judicial review should not be denied under the circumstances.

APPENDIX C

No. 70 C 1177

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY and ETHELLE KATZ and BERTHA KATZ,

Plaintiffs,

v.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO.

Defendants,

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

Before the Court are defendants' motions for (1) dismissal for mootness, and (2) summary judgment on the merits.

This case was originally filed as a bilateral class action under the Securities Exchange Act of 1934. Plaintiffs sought to represent a class of all owners of savings accounts in Chicago area federally-chartered savings and loan institutions. The defendant class was alleged to consist of all such savings and loan institutions. The complaint alleged the existence of false and misleading statements and the omission of material facts in communications made by defendants to plaintiffs in

promotional materials. By orders of March 27, 1972, and October 17, 1972, respectively, this Court held that the action could not be maintained against a defendant class, nor by a plaintiff class. An appeal was taken by the named plaintiffs from the latter order. This appeal was dismissed by the Seventh Circuit which held that an order denying class action status is not a final appealable order. Certiorari was denied by the Supreme Court.

Thus the amended complaint is brought by the six named plaintiffs against the three named savings and loan institutions. Plaintiffs seek damages, costs, attorney's fees, and injunctive relief. Defendants assert, and plaintiffs concede, that defendants have tendered to plaintiffs the claimed damages ($12 per plaintiff) and costs, and that attorney's fees are not authorized by statute.

Satisfaction of the plaintiffs' claims render these issues moot. *Hill v. Beak*, 39 U.S. 45 (1969); *Watkins v. Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969).

The central mootness issue before the Court is plaintiffs' prayer for injunctive relief. The amended complaint seeks a permanent injunction to prevent the defendants ". . . from misrepresenting the manner of calculation of dividends upon savings accounts issued by them and from omitting to state facts necessary to fully inform said purchasers and sellers of the manner of such computation." It is not disputed that the defendants have changed their disclosure practices and that the "evils complained of have been cured" (pp. 2-3, affidavit of plaintiffs' counsel). This was done early in 1971. The question to be answered is whether this fact renders the injunction claim moot.

It is true, as an abstract proposition, that ". . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot . . .", *United*

States v. W. T. Grant Co., 345 U.S. 629, 632-33 (1953). The question in this case is whether there is arguably any possibility that the allegedly unlawful acts will reoccur. *United States v. Oregon State Medical Society*, 343 U.S. 326, 333-334 (1952). For this to happen, defendants would have to return to the old disclosures, and plaintiffs would again have to rely thereon. It strains credulity to believe these plaintiffs would rely on disclosures which they obviously believed to be fraudulent. This possibility is much too speculative and unlikely to support a live controversy. See *DeFunis v. Odegaard*, 414 U.S. 1038 (1974). Plaintiffs cannot arguably show that defendant is likely to harm them unless an injunction issues. *O'Shea v. Littleton*, 414 U.S. 488 (1973). Thus it appears to this Court that the injunction issue is also moot.

If a case is moot there is no Article III controversy and this Court is without authority to hear the matter further. It is worth noting that if this case presented a proper class action, a different conclusion would have to be reached as to mootness. *Board of School Commissioners v. Jacobs*, ... U.S. ..... (43 U.S. L.W. 4238, Feb. 18, 1975).

In view of the above conclusion as to mootness, the Court cannot reach the questions raised by the motion for summary judgment.

Defendants' motion to dismiss for mootness is GRANTED and the action is DISMISSED.

/s/ Joel M. Flaum
United States District Judge

DATED: March 21, 1975

APPENDIX D

Marshall WINOKUR et al., Plaintiffs,

v.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION et al., Defendants.

No. 70 C 1177.

United States District Court,
N.D. Illinois, E.D.
Oct. 17, 1972.

58 F.R.D. 178

MEMORANDUM OPINION AND ORDER

BAUER, District Judge.

This cause comes on defendants' motion pursuant to Rule 23(c) of the Federal Rules of Civil Procedure for an order denying the right to maintain this cause as a class action as to plaintiffs. This Court previously ruled on March 27, 1972 that a class action as to the defendants could not be maintained in this suit.

The named plaintiffs Marshall and Rae Winokur are holders of a savings account issued by defendant Bell Federal Savings and Loan Association (hereinafter referred to as "Bell"); Abe and Celia Brodsky, at all times relevant to this suit, were holders of a savings account issued by defendant Home Federal Savings (hereinafter referred to as "Home"); and plaintiffs Ethelle and Bertha Katz, at all times relevant to this suit, were holders of a savings account issued by Uptown Federal Savings and Loan Association of Chicago (hereinafter referred to as "Uptown"). Bell, Home and Uptown, all federally chartered savings and loan associations, are authorized by statute[1] to raise capital by the sale of savings accounts to the public.

[1] 12 U.S.C. § 1464.

The complaint alleges that plaintiffs are purchasers and/or sellers of securities and that the defendants have made and are continuing to make misstatements and omissions of material fact in connection with such purchases and sales in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10(b)(5) of the Rules of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5. More specifically, plaintiffs allege the following misleading statements:

1. "The defendants falsely advertise that the dividends paid by them are the equivalent of interest compounded daily. . . ." [This is alleged to be a misstatement because if a depositor withdraws prior to the last day in any calendar quarter, he is paid no dividends at all on the withdrawn funds for that quarter.]
2. "The defendants omit to state that no dividend at all is paid for the balance of a calendar month in which a deposit is made subsequent to the 10th day of that month." [This is alleged to be misleading because defendants advertise that "all savings in by the 10th earn from the 1st" and omit to mention that deposits made after the 10th of the month do not earn interest until the first of the following month.]

Jurisdiction is alleged under 15 U.S.C. § 78aa. At this time, the Court need not consider the propriety of jurisdiction under this section.

Plaintiffs seek to bring this suit as a class action under Rule 23 on behalf of all persons who have withdrawn or deposited money in Bell, Home, and Uptown and who have thereby suffered loss in that they "(i) withdrew funds prior to the end of a calendar quarter and did not receive dividends equivalent to interest compounded daily, or (ii) deposited funds after the 10th day and prior to the end of the month and received no dividends at all for this period."

Plaintiffs contend that they meet the requirements of Rule 23, directing the main thrust of their arguments to the propositions that: (1) they are representative of the plaintiff class they seek to represent; (2) there are questions of law and fact common to the class and that these questions "predominate over questions affecting only individual members"; and (3) such a class action is manageable because where a Rule 10(b)(5) violation is alleged reliance by each member of the class on the misrepresentation need not be shown, but rather merely the materiality of the misrepresentation must be shown.

Defendants contend that the requirements of Rule 23 have not been satisfied because, *inter alia*, the individual plaintiffs are not representative of the class on whose behalf they are suing. Defendants further contend that numerous individual questions are raised by this action, that consequently common issues do not predominate, and that the class action would be an unmanageable rather than a superior means of adjudicating this controversy. Defendants also take the position that an individual does not have a claim for a misleading statement under Rule 10(b)(5) unless the individual relied on the statement to his detriment.

The arguments presented by the plaintiffs are unpersuasive; thus, this Court finds that the requirements for a Rule 23 class action have not been satisfied.

REQUIREMENTS FOR THE MAINTENANCE OF A CLASS ACTION

In order for a class action to be the proper mechanism for adjudicating a controversy, the following requirements for Rule 23(a) must all be satisfied:

1. the class must be so numerous that joinder of all members would be impracticable;
2. there must be questions of law or fact common to the class;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties must fairly and adequately protect the interests of the class.

In addition, one of the provisions of Rule 23(b) must also be satisfied. This Court is of the opinion that the purported class of plaintiffs does not meet at least two of the four prerequisites of Rule 23(a).

THE CLAIMS OF THE REPRESENTATIVE PARTIES ARE NOT TYPICAL OF THE CLAIMS OF THE CLASS

In Jacobs v. Paul Hardeman, Inc., 42 F.R.D. 595 (S.D.N.Y. 1967), plaintiffs sought on behalf of a class of "all present and former debenture holders similarly situated" the rescission of individual purchases of debentures and damages for alleged misrepresentations in and omissions of material facts from a registration statement and prospectus. The court dismissed the class action aspect of the complaint on grounds that:

> ". . . while there are probably some questions of law and fact common to some of the purchase transactions, this . . . is certainly not true as to all." 42 F.R.D. at 598.

The court held that the requirements of 23(a)(3) and (4) had not been complied with because the named plaintiffs had purchased stock from underwriters on the basis of a prospectus and registration statement while other members of the class had later purchased in the open market after various information about the company's financial reverses had been publicized. The court in dismissing the class action concluded that the claims of the named plaintiffs would not be typical of those of the later purchasers, that their factual and legal positions were significantly different, and thus that the later purchasers would not be fairly and adequately represented.

[1, 2] It is the opinion of this Court that the questions of fact subject to determination in this cause will be almost as numerous as the members of the plaintiffs' class and that there are potentially as many classes as depositors. This situation is caused by the fact that different representations have been made to every member of the class. Where there is an attempt to bring a class action based on an alleged 10(b)(5) violation, there must be a material misrepresentation which is common to the class. Jacobs v. Paul Hardeman, *supra.* It is clear from the pleadings that each individual defendant utilized a different advertisement which would be relevant only to claims made by its own customers. Thus, contrary to the contentions of the plaintiff, there are at least three major grouping within the class to whom varied representations have been made. Further, it is also clear from the pleadings that many, if not most, customers of these savings and loan associations open their accounts in person at the office of the association and are fully advised at that time of the various types of accounts offered, as well as the rules, regulations and terms pertaining to each type of account—including the rate and basis of computing interest. Many other individual depositors received the same information by phone or letter. Additionally, the passbook or certificate given to the depositor generally contains this information. Thus, information that was not contained in the plaintiffs' advertisements was in fact available and known to many depositors before funds were committed.[2] In each of these situations, there

[2] The Court in Kohler v. Kohler Co., 319 F.2d 634 (7th Cir. 1963) ruled that defendants are obliged to disclose to plaintiffs only those material facts which are reasonably believed to be unknown to the plaintiff. In City National Bank of Fort Smith, Arkansas v. Vanderboom, 422 F.2d 221, 231 (8th Cir. 1970) the Court noted that the Seventh Circuit had held in *Kohler* that:

> ". . . the failure of [defendant] to disclose material facts to the plaintiff will not lead to liability under 10b-5 where the plaintiff himself has the ability and opportunity to discover those facts easily."

(Footnote continued on following page)

were different representations made by different individuals which would affect the materiality of the "misrepresentations".

[3] It is the opinion of this Court that there are factual questions essential to the claim of each member of the class (as defined by plaintiff) which cannot be answered within the framework of a class action. This Court further believes that it would be impossible without a hearing on the claim of each individual member of the class to determine which depositors of defendant savings and loan associations are in fact members of the class. It would be necessary to determine (1) what type of account an individual had and whether it was subject to the claims raised by plaintiffs; (2) whether each alleged member of the class had, in fact, read the advertisements complained of and had been misled by any of the alleged misrepresentations contained therein; and (3) whether representations of the interest policy had been made to him orally or whether he had read a statement of the interest policy contained in his passbook or in the association's charter which would counter the advertisements complained of. Answers to all of the above questions are essential to determine whether there have been "material misrepresentations".

Because of the above factors, the question of whether or not there has been a material misrepresentation is not a question common to the class but rather is a question to be answered by each individual member of the class. Thus, as in the *Jacobs* case, the claims of the named

[2] *continued*

Recent cases similar to the one at Bar have held that defendants are not required to say that which has been publicly proclaimed in several different ways on several different occasions. Johnson v. Wiggs, 443 F.2d 803 (5th Cir. 1971); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971), cert. denied, 404 U.S. 1004, 92 S.Ct. 564, 30 L.ED.2d 558 (1971); Hafner v. Forest Laboratories, Inc., 345 F.2d 167 (2d Cir. 1965); Phillips v. Reynolds and Co., 294 F.Supp. 1249 (E.D. Pa. 1969).

plaintiffs are not typical of those of all depositors in Bell, Home or Uptown who are alleged to be members of the class, since individual factual situations of each class member may vary significantly. In addition to the variance of claims as between named and unnamed plaintiffs, already two of the six named plaintiffs have presented a claim which is not typical of the original claim presented on behalf of the class.[3]

[4] The Advisory Committee Notes to Rule 23 state:

> ". . . [On] the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."

In line with this position, courts have denied class actions in suits involving 10(b)(5) violations because of varying misrepresentations and the consequent absence of significant questions of fact common to all members of the putative class.[4]

---

[3] The discovery process elicited the fact that neither Abe nor Celia Brodsky had made any deposits after the 10th of the month. Further, despite advertisements which were allegedly misleading, both Abe and Celia admitted during a deposition that they knew the interest policy of Home Federal Savings and had never relied on the allegedly misleading advertisement. The Brodskys, *qua* named plaintiffs, seek to represent all persons misled by the Home advertisement. However, the facts as disclosed by depositions reveal that the Brodskys themselves are not members of the class which they seek to represent. These facts indicate not only that the Brodskys may encounter difficulty in successfully bringing this claim but also that the claims of individual named plaintiffs are not typical even among themselves.

[4] Morris v. Burchard, 5 F.R.D. 530 (S.D. N.Y. 1971); *Moscarelli v. Stamm*, 288 F.Supp. 453 (E.D.N.Y. 1968).

It is this Court's opinion that the plaintiffs cannot maintain a class action because they have not met the requirements of Rule 23(a). Thus, this Court need not decide whether the plaintiffs in their quest for a class action have met the requirements of Rule 23(b) or whether reliance is still an essential element of 10(b)(5) action.

Accordingly, it is hereby ordered that defendants' motion to disallow the maintenance of the instant action as a class action is granted.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1973.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

EDWARD Q. LUPIA, Etc., Plaintiff(s)-Appellant,
No. 73-1026 vs.
STELLA D'ORO BISCUIT CO., INC., Defendant-Appellee.

FRANK A. GARZA, Etc., Plaintiff-Appellant,
No. 73-1012 vs.
CHICAGO HEALTH CLUBS, INC., et al., Defendant-Appellees.

MARSHALL WINOKUR, et al., Plaintiffs-Appellants,
No. 72-2029 vs.
BELL SAVINGS & LOAN ASSOCIATION, et al., Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 738
Philip W. Tone,
Judge

No. 71 C 643
Richard W. McLaren,
Judge

No. 70 C 1177
William J. Bauer,
Judge

ORDER

These three cases involve the much disputed question whether the dismissal of a class action portion of a complaint is appealable In *Thill Securities Corp. v. New*

York Stock Exchange, 469 F.2d 14, 17 (7th Cir. 1972), we held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. § 1291. We now hold that the present orders are not appealable, necessitating the dismissal of the three appeals for lack of jurisdiction.

In so holding, we follow *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972), certiorari denied, 407 U.S. 925; *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972); and our analogous prior decision in *Jumps v. Leverone*, 150 F.2d 876 (7th Cir. 1945). If the interlocutory appeals route of 28 U.S.C. § 1292(b) had been successfully followed. review would be available. 9 Moore's Federal Practice ¶110.13[9] p. 184 (2d ed. 1972).

Appeals dismissed.

APPENDIX F

No. 76 C 427

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANN FLAMM and ARNOLD M. FLAMM,

Plaintiffs,

v.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,

Defendants.

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This case was filed as a class action asserting claims under the Securities Exchange Act of 1934, §§ 10(b), 14(e), 15 U.S.C. §§ 78j(b), n(e). In an opinion dated October 19, 1976, this court issued a ruling denying plaintiffs' motion for class certification because of plaintiffs' failure to meet the requirements of Fed. R. Civ. P. 23(a)(4). *Flamm v. Eberstadt*, 72 F.R.D. 187 (N.D. Ill. 1976). Thereupon, this court, pursuant to 28 U.S.C. § 1292(b), certified the issue of whether plaintiffs' were adequate representatives of the class they sought to represent to the court of appeals, and on January 25, 1977 that court granted plaintiffs' permission to appeal. In an opinion dated August 31, 1977, the Seventh Circuit affirmed this court's ruling denying plaintiffs' motion for class certification. *Susman v. Lincoln American Corp.*, No. 77-1145 (7th Cir. August 31, 1977).[1]

[1] This court had certified the *Flamm* case and the *Susman* case for purposes of an interlocatory appeal since they both involved the same class action issue.

Plaintiffs have again moved for class certification stating that the reason this court found them to be inadequate class representatives no longer exists and class certification is appropriate at this time. However, before the briefing on this question was completed and this court could rule on plaintiffs' motion, defendants, in a letter dated November 1, 1977, tendered[2] to plaintiffs the amount of money they claimed they had been individually deprived of by defendants' actions as alleged in the instant complaint. Defendants have now moved to dismiss plaintiffs' complaint on the ground of mootness arguing that there does not exist at this time a justicable, Article III of the Constitution "case or controversy" between plaintiffs and defendants. Thus, defendants argue that since plaintiffs have obtained all the relief they seek to obtain from this lawsuit it would be a waste of judicial energy, as well as a violation of the constitutional prohibition against courts rendering advisory opinions, to allow this case to continue. For this proposition defendants primarily rely on the recent decision in *Winokur v. Bell Federal Sav. & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977). After reviewing the briefs submitted by the parties, this court is compelled to grant defendants' motion because of the Seventh Circuit's ruling in *Winokur*, and accordingly this cause is dismissed.

In opposition to defendants' motion, plaintiffs present two arguments. First, plaintiffs rely on a line of cases starting with *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), which hold that the "mere voluntary cessation of allegedly illegal conduct does not moot a case." *Burbank v. Twomey*, 520 F.2d 744, 747 (7th Cir. 1975). Plaintiffs argue from this proposition that defendants,

[2] Although the plaintiffs challenge the adequacy of defendants' tender for several reasons, this court finds the letter to plaintiffs to constitute a valid tender to end the controversy between the named plaintiffs and defendants. *See, e.g.*, Guthrie v. Curnutt, 417 F.2d 764 (10th Cir. 1969); Martindell v. Lake Shore Nat'l Bank, 15 Ill. App. 2d 217, 145 N.E. 2d 784 (1957), *rev'd on other grounds*, 15 Ill. 2d 272, 154 N.E. 2d 683 (1958).

by tendering to plaintiffs the amount of their individual claims, cannot moot this action by their own voluntary acts. This analysis, however, is incorrect. As was recognized in *Winokur*, the doctrine as enunciated in *W. T. Grant* only applies if there is the possibility that the defendant will continue in the future to infringe upon plaintiff's rights. *Winokur v. Bell Federal Sav. & Loan Ass'n*, 560 F.2d 271, 274 (7th Cir. 1977). Since plaintiffs do not seek injunctive relief in this cause, and since plaintiffs have not indicated that they fear that defendants will again injure them by way of further violations of the federal securities laws, plaintiffs' first argument based upon *W. T. Grant* and its progeny is without merit.

Plaintiffs' second argument, although more substantial in this court's view, is likewise without merit in light of *Winokur*: Plaintiffs argue that because they presently have pending a motion for class certification the mere fact that their individual claims may be moot does not render this action, as a class action, moot. Thus, plaintiffs rely on the limited exception to the mootness doctrine as applied to class actions delineated in *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975), and as applied by this and other courts. *See, e.g., Langson v. Simon*, 74 F.R.D. 456 (N.D. Ill. 1977) (Flaum, J.); *Custom v. Trainor*, 74 F.R.D. 413 (N.D. Ill. 1977) (Marshall, J.); *Robinson v. Leahy*, 73 F.R.D. 109 (N.D. Ill. 1977) (Flaum, J.).

In *Gerstein*, the Supreme Court was faced with an action by individuals who were in police custody for pretrial detention. The plaintiffs, seeking to represent a class of all persons subject to such pretrial detention who were not afforded preliminary hearings as to the charges levied against them, challenged their confinement as violative of due process of law. The Supreme Court, in reviewing the record before it, noted that the named plaintiffs had been convicted of the charges against them and were no longer in pretrial custody. Moreover, the court noted that the record was not clear as to whether at the time the trial court granted plaintiffs' motion for class certification the named plaintiffs

were still in pretrial detention and had a viable case or controversy with the defendants. *Gerstein v. Pugh*, 420 U.S. 110-11 n.11.

In considering whether the action was moot because the named plaintiffs' claims had been resolved, the Supreme Court stated that even if there had not been a live controversy between the named plaintiffs and defendants at the time the class certification motion was granted, the plaintiffs' action could continue to vindicate the rights of those the named plaintiffs sought to represent. Thus, the court stated that although as a general rule a named plaintiff must be a member of the class he seeks to represent at the time the class is certified, and must at that time have a live controversy with the defendant, in order for a class action to continue in light of the subsequent mootness of the named plaintiff's claim, *see Sosna v. Iowa*, 419 U.S. 393 (1975), an exception to this rule existed when: (1) the nature of the plaintiff's and the class' claims were such that the plaintiff would have suffered his injury before the court could rule on his motion for class certification; (2) it was certain that a constant class of persons suffering the deprivation existed; and (3) the attorney representing the named representative has other clients with a continuing live interest in the case, *i.e.*, a public defender. *Gerstein v. Pugh*, 420 U.S. at 111 n.11.

In the case at bar, plaintiffs argue that this action falls within the ambit of the *Gerstein* exception to the mootness doctrine and this court should rule that although the named plaintiffs' claims are moot this case should continue so as to vindicate the rights of the class the named plaintiffs seek to represent. Thus, plaintiffs argue that the unilateral action of defendants in tendering to the named plaintiffs the amount of their individual claims cannot be held to moot the class allegations because defendants will thereupon be able to prevent a class from ever having its claims vindicated.

While this court recognizes the rule as delineated in *Gerstein*, and as noted previously has applied that rule

under different circumstances, this court is bound by the holding of the Seventh Circuit in *Winokur*. In *Winokur*, plaintiffs' filed a federal securities class action in which they sought injunctive and monetary relief. Plaintiffs sought to have a class certified but the district court found that plaintiffs had not established the propriety of maintaining their action on a class-wide basis. Plaintiffs' request to have the issue certified to the court of appeals pursuant to 28 U.S.C. § 1292(b) was denied and plaintiffs were barred from appealing the denial of class status since such orders are not appealable in this circuit. *See Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972). Thereafter, defendant tendered to the named plaintiffs the amount of their individual claim and changed its policies to avoid creating the same difficulties from arising again. This court[3] thereupon dismissed the action as moot stating that no case or controversy existed between the named plaintiffs and defendant in light of the fact that class certification had been denied.

The court of appeals affirmed the order of dismissal. *Winokur v. Bell Federal Savings & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977). However, more importantly for the issues before the court in the case at bar, the court of appeals also held that it lacked jurisdiction to consider whether the district court had erred in denying class certification. Thus, plaintiffs' in *Winokur* argued that had the district court certified the class they sought to represent their action would not be moot even in light of defendant's tender. The court of appeals, plaintiffs argued, was therefore required to consider plaintiffs' request for class certification since plaintiffs' were not allowed to appeal the denial of their class motion previously. The Seventh Circuit rejected this argument stating the rule of law applicable to the case at bar as:

> When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.

[3] This court was transferred the *Winokur* case after the denial of class certification.

It is clear to this court that the facts of this case, although different in minor respects, falls squarely within the ambit of the *Winokur* holding. Thus, as in *Winokur*, plaintiffs herein have had their motion for class certification denied and in fact this denial was affirmed. Defendants have tendered the named plaintiffs the amount of their individual claims and there is presently no case or controversy between them. The fact that there is presently pending a motion for class certification does not make this case different from *Winokur* since this is exactly the same as having an appeal before the court of appeals seeking a review of a class action motion denial.

Plaintiffs argue, however, that this court should not apply the *Winokur* case to their class action claims for several reasons. First, plaintiffs argue *Winokur* involved appellate review and the case at bar is still in the district court. While this is a difference, as stated above, it is not material. When an action becomes moot it ousts the court in which it is pending of jurisdiction to consider any other matters in that case. If the court of appeals felt itself barred by Article III to consider the propriety of class certification in *Winokur*, this court is no less barred from considering plaintiffs' renewed motion for class certification.

Second, plaintiffs argue that this court should treat its renewed motion for class certification as a motion to "reconsider" the prior denial of class certificaton. This, plaintiffs argue, would allow this court to make the granting of the class motion now "relate back" to the previous denial and would prevent any mooting of plaintiffs' class claims. However, this argument is simply a restatement of the plaintiffs' first argument and for the same reasons as previously mentioned must be rejected.

Finally, plaintiffs argue that *Winokur* is wrongly decided. Thus, plaintiffs argue that the rule stated in *Winokur* and previously quoted in this opinion is directly in conflict with the holding in *Gerstein* that class actions can be certified in certain cases where the named plaintiffs' claims are mooted prior to certification. However, whatever the merits of this argument, plaintiffs position must fail in this district court which is bound by the pronouncements of its court of appeals. This court recognizes that other courts, unlike the Seventh Circuit, have reviewed denials of class certification after plaintiff's claims have been mooted, *see, e.g., Cameron v. E. M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976); *but see Napier v. Gertrude*, 542 F.2d 825 (10th Cir. 1976), *cert. denied*, 97 S.Ct. 759 (1977). Moreover, this court notes that the Seventh Circuit did not cite *Gerstein* in its opinion in *Winokur* although it did cite cases decided after that decision.[4] Nevertheless, this court cannot say that the court of appeals did not consider *Gerstein* and find its principles inapplicable to the case at bar. It is possible that the court of appeals was of the opinion that the *Gerstein* exception did not apply in class actions to be certified under Fed. R. Civ. P. 23(b)(3) since it is not likely that defendants would repeat their illegal activity. Or perhaps the court decided that private class action attorneys did not meet the *Gerstein* requirement of class action counsel who had clients like the named plaintiffs interested in the vindication of the class' rights. Hence, whatever the court of appeals' reasons, *Winokur* is decided and its mandate must be obeyed.

[4] In fact, the court in *Winokur* cited Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975), the decision in volume 420 of the United States Supreme Court Reports which immediately follows *Gerstein*.

Accordingly, this court must declare plaintiffs' action moot. The issues raised by plaintiffs concerning the problems of maintaining a class action when the defendants have the ability to moot the case must be resolved by the court of appeals in light of *Winokur*. On its facts this action is identical to *Winokur* and it must be dismissed.

It is so ordered.

/s/ JOEL M. FLAUM
United States District Judge

Dated: December 30, 1977

In The

Supreme Court of the United States

October Term, 1977

No. 77-1020

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ, et al.,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF THEIR PENDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to Rule 24(5), Rules of the Supreme Court of the United States, Petitioners submit herewith their supplemental brief for the purpose of calling the Court's attention to a new case not available at the time of last filing, namely, the opinion of the United States Court of Appeals for the Third Circuit, rendered March 9, 1978,

in the cause entitled *Geraghty, et al. v. United States Parole Commission, et al.*, Docket No. 77-1679 (consolidated with Docket No. 77-1858).

The Petition for Certiorari was filed in this case on January 17, 1978, and has not been acted upon. A reply brief was filed by these Petitioners on or about February 24, 1978.

Appended hereto is the full text of Section B-3 of the Third Circuit's opinion in the *Geraghty* case (pp. 18-24 of the slip opinion), that being the portion of the opinion most relevant to the case at bar. (The full opinion is 62 pages in length, plus a four page appendix.)

Petitioners respectfully suggest that the position taken by the Third Circuit in *Geraghty* is fully in accord with that advocated by Petitioners in the Petition for Certiorari, is strongly persuasive on the merits of that position, and is squarely in conflict with the position adopted by the Seventh Circuit in the instant case.

This Court's attention is directed particularly to footnote 49 (A. 4a) wherein the Third Circuit acknowledges the existence of a conflict among the circuits, as asserted in the Petition for Certiorari.

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APPENDIX

3. *The Impact of Denial of Class Certification*

In this case the trial court refused class certification. The question, then, is whether such refusal combined with Geraghty's release prevents our review of this matter, on the ground that we have before us neither a "live" plaintiff nor a properly certified class.

The Parole Commission earnestly contends that under *Board of School Commissioners of Indianapolis v. Jacobs*,[42] in the absence of a properly certified class the mooting of a named plaintiff automatically removes the suit from the category of a justiciable case or controversy. Reading *Jacobs* in this fashion, however, is incompatible with the Supreme Court's holdings in both prior and subsequent cases.[43]

In *Gerstein v. Pugh*,[44] the short duration of challenged pretrial custody precluded a class from being certified before the named plaintiffs were released. Nevertheless, the district court certified a class of pretrial detainees, and entertained the action. Noting that the challenged procedures would continue to apply to a succession of pretrial detainees, the Supreme Court held that the class

[42] 420 U.S. 128 (1975).

[43] The statements in *Sosna*, *Franks*, *Gerstein*, and *East Texas* that justiciability remains "given a properly certified class" may simply point to *certifiability*, not actual certification, as the crucial question. *See Satterwhite v. City of Greenville*, 557 F.2d 414, 417-421 (5th Cir. 1977) *rehearing en banc granted; Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975) (Friendly, J.) (*Sosna's* insistence on continuing existence of individual claim until certification is "drained" by "relation back" doctrine). Similarly, *Weinstein v. Bradford*, 423 U.S. 127 (1975), which dismissed a parole challenge as moot, is inapposite here since the *Weinstein* plaintiffs did not appeal the denial of class certification. *Cf. Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976) (individual action, no attempt to certify class).

[44] 420 U.S. 103 (1975).

certification preserved justiciability even though the certification might have been entered after the named plaintiffs lost a "live" interest in the suit.[45]

The Supreme Court in *Baxter v. Palmigiano*[46] adjudicated a controversy concerning prison regulations, although the case had not been properly certified as a class action and the named plaintiffs had died or had been released prior to the oral argument on appeal. The Supreme Court held that the subsequent intervention of another prisoner brought a justiciable case before the Court. This was so despite the fact that it was not clear that when the intervention had occurred, the district court still had a "live" individual plaintiff before it.

---

[45] The stated rationale, that the later certification "related back" to the time that the plaintiffs had claims is at best a legal fiction. *See Gardner v. Westinghouse*, (Seitz, J. concurring) No. 76-1410 (3d Cir. 1977) slip op. at 18-19, *cert. granted* ..... U.S. .....; *Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975).

The *Gerstein* decision had been presaged by *Kelly v. Wyman*, 294 F. Supp. 887, 890 (S.D.N.Y. 1968) *aff'd sub nom Goldberg v. Kelly*, 397 U.S. 254, 256 n. 2 (1970). There the district court refused to dismiss a challenge to welfare regulations before class certification despite an allegation that most if not all of the named plaintiffs had been reinstated to welfare, on the ground that "plaintiffs claim to represent a class." The Supreme Court affirmed the class relief, noting that some of the then-named plaintiffs were still embroiled in disputes with the welfare department. It was not clear, however, whether those plaintiffs had been named at the time of the original decision or had subsequently intervened. *See Goosby v. Osser*, 409 U.S. 512 (1973) (adjudicating class action of prisoners confined to pretrial detention, despite the fact that apparently there was no indication whether they had been released prior to class certification); *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973) (*en banc*) (allowing class action on behalf of juvenile detainees, despite the fact that named detainees had been released after short time).

Since *Gerstein* a number of courts have allowed certification on a "relating back" theory. *E.g. Williams v. Wohlgemuth*, 540 F.2d 163 (3d Cir. 1976); *Basel v. Knebel*, 551 F.2d 395, 397 (D.C. Cir. 1977); *Zurak v. Regan*, 550 F.2d 86 *cert. denied* ..... U.S. ..... (2d Cir. 1977).

[46] 425 U.S. 308, 311 n. 1 (1976).

Most recently, in *United Airlines v. McDonald*,[47] the Supreme Court reviewed a refusal to allow putative class members in an employment discrimination suit to intervene in order to appeal a denial of class certification. By the time the motion for intervention was presented, the original named plaintiffs had already been awarded relief and as to them the case was moot. Again, intervention was permitted at a time when the named plaintiffs no longer retained "live" claims.

In light of *Gerstein*, handed down on the same day as *Jacobs*, and of *Baxter* and *McDonald*, both decided after *Jacobs*, the *Jacobs* case should not be viewed as standing for the proposition that the federal courts are constitutionally barred from continuing to adjudicate disputes when the named plaintiff no longer retains his claim. So long as a factually concrete legal controversy continues to exist, it would appear that the constitutional *power* of a court over the case remains. Consequently, the holding of *Jacobs* is perhaps best understood as a specific instance that must be seen in the context of the over-arching set of principles adumbrated by the authorities cited above.

In *Jacobs*, the Supreme Court reviewed a First Amendment challenge by a group of students to regulations limiting publication of a newspaper. Since the students had graduated, and the periodical in question had ceased publication, the inability to delimit accurately the plaintiff class deprived the Court of the assurance of justiciability. In addition, the failure of counsel to seek a proper class certification cast serious doubt on the continued adequacy of the adversarial clash.[48]

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[47] 45 U.S. L.W. 4760 (1977). *Cf. Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir. 1975) (allowing substitute plaintiff to intervene for named plaintiff who never had standing, but allowing filing of original class action to toll statute of limitations).

[48] As other courts have noted, the failure to certify the class in *Jacobs* was not assigned as error. *Napier v. Gertrude*, 542 F.2d 825, 827 (10th Cir. 1976) *cert. denied* ..... U.S. ..... (1977); *Gardner v. Westinghouse*, No. 76-1410 (3d Cir. 1977) slip op. at 18 n. 5 (Seitz, J. concurring) *cert. granted* ..... U.S. ..... .

An appropriately defined and certified class assures the courts that the case involves a concrete legal controversy, proper factual predicate, and functional adversity. The lack of certification, however, does not inevitably require dismissal, if the elements of justiciability are otherwise established.[49] Thus, in *Gerstein*, *Baxter*, and *McDonald* no doubt could validly have been raised concerning the continuation of the underlying legal controversies. Counsel in *Gerstein* and *McDonald*, could not have been charged with responsibility for the failure of certification, and in both *Baxter* and *McDonald* the continuation of the adversarial difference was assured by the intervention of live plaintiffs. In those situations, a concrete dispute continued and representation was adequate. Consequently, the cases were not dismissed.

In the matter before us, there is neither a contention by the government nor evidence in the record which raises any question but that a legal controversy exists. The fate of numerous federal prisoners continues to turn in large part on the application of the guidelines in

[49] We acknowledge that the courts of appeals are divided on the question of whether under the recent Supreme Court decisions, the denial of class action status is appealable by a named plaintiff whose claim has become moot. *Banks v. Multi Family Management*, 554 F.2d 127 (4th Cir. 1977) (Refusal to certify since development of mootness was not "inherent in the nature of the claims," and the named defendant had already agreed to relief sought); *Satterwhite v. City of Greenville*, 557 F.2d 414 (5th Cir. 1977) *rehearing granted en banc* (refusal to certify class is appealable if improper if at the time that the class should have been certified, and the named plaintiff still had a live claim at that time); *Kuahula v. Employers Insurance of Wausau*, 557 F.2d 1334 (9th Cir. 1977) (survival of action is governed by "idiosyncrasies of each case;" action in question did not survive, but the Court suggests a number of situations in which it might); *Winokur v. Bell Federal Savings and Loan*, 560 F.2d 371 (7th Cir. 1977) (damages claimed were tendered to individuals, no plausible claim of repetition, no review allowed of failure to certify class. Dictum that issue of class certification cannot survive mooting of individual claims; *Napier v. Gertrude*, 542 F.2d 825 (10th Cir. 1976) (review available where failure to certify is "correctable on appeal," correctability is a function of particular situations, mainly available in situations otherwise evading review).

question. Such a situation in our view satisfies the "case or controversy" components of the mootness doctrine. Further, under the circumstances of this case, the more discretionary elements of the restrictions against entertaining moot cases do not mandate dismissal. Four aspects of the case lead to this conclusion.

First, Geraghty's action, while not wholly congruent, shares many characteristics with the cases denominated "capable of repetition, yet evading review." This is so since federal prisoners are eligible for parole if their sentences exceed one year.[50] Accordingly, while some prisoners will retain their grievances long enough to achieve appellate review, a number of prisoners with short sentences, like Geraghty, will inevitably be discharged before they have an opportunity to litigate fully the legality of the rules which deny them parole. This alone is a factor weighing heavily in favor of justiciability.[51] And since it is the prisoners with unusually short sentences to whom the parole guidelines deny the benefit of the trial judge's leniency,[52] the limited probability of review for a prisoner with a short sentence is particularly pertinent.

Second, as we have noted, this case involves denial of a class action certification. As Chief Judge Seitz observed in *Gardner v. Westinghouse*,[53] if mooting of a named plaintiff's claim bars review of a denial of class cer-

[50] 18 U.S.C. § 4205 (1976).

[51] *See Zurak v. Regan*, 550 F.2d 86 (2d Cir. 1977) (prisoners whose complaints on parole procedure would often—but not always—evade review were allowed to "relate back" certification to a time before the named plaintiff's release). *Cf. United States v. Frumento*, 552 F.2d 334 (3d Cir. 1977) (*en banc*) (compulsion to testify before grand jury).

[52] The government's brief in this action (p. 12) suggests that only prisoners with short sentences have an interest in attacking the guidelines' failure to take account of sentence length.

[53] Slip op. No. 76-1410 (3d Cir. 1977) (Seitz, C.J. concurring) *cert. granted* ..... U.S. ..... .

tification, our rule against interlocutory appeals of class certification orders will, in a significant number of cases, effectively immunize from review such adverse class determinations. This is hardly a salutary result for, although class certification had been improperly denied, a constitutionally justiciable controversy nevertheless continues to exist.

Third, the attorneys for Geraghty, while not possessed of a legally continuing relationship with members of the plaintiff class,[54] have nonetheless undertaken this litigation on a class-oriented basis. There is no indication of any diminution of vigor in their efforts despite the release of Geraghty. Indeed, as already observed, they represent another individual plaintiff who now seeks to intervene in the matter. Consequently, there is a *prima facie* case of functional adversity, a central element which the mootness doctrine seeks to preserve.

Finally, the major issues in the case in no way appear to be tied to the nuances of individual fact patterns. The discharge of Geraghty does not alter either the interests of the members of the putative class[55] or the practice of the Parole Commission in applying its guidelines.[56]

Hence, if class certification is appropriate in this case, the mootness of Geraghty's claim should not bar adjudication.

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[54] *Cf. Gerstein v. Pugh*, 420 U.S. 103, 110, 111 n. 11 (1975) (public defender had continuous relationship with class of pretrial detainees).

[55] *Cf. Kremens v. Bartley*, 431 U.S. 119 (1977).

[56] *See* Note, *Mootness Doctrine*, *supra* note 22 at 394. *Cf. De Funis v. Odegard*, 416 U.S. 312 (1975).

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IN THE

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OCTOBER TERM, 1977

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BRIEF OF HOME FEDERAL SAVINGS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL QUESTIONS PRESENTED

1. As to Plaintiffs' Questions Presented 1-2: Whether certiorari should be granted to review dicta where the rejection by the Court of the dicta could not affect the result in the case at bar. (See pages 11-13, below.)

2. As to Plaintiffs' Questions Presented 1-2: Whether a question can be raised via certiorari when (a) the question was expressly waived in the District Court, (b) the District Court expressly relied upon that waiver in deciding the case, (c) the question was not briefed in the Court of Appeals prior to decision, and (d) the question was first presented in a petition for rehearing in the Court of Appeals over Defendants' objection that it had been waived. (See pages 2-11, below.)

3. As to Plaintiffs' Question Presented 3: Whether a question can be raised via certiorari when the same petitioner took exactly the opposite position in a prior petition for certiorari filed *in the same case*. (See pages 13-14, below.)

SUPPLEMENT TO STATEMENT OF THE CASE

Plaintiffs initially sought three forms of relief: (1) injunctive relief; (2) attorneys' fees; and (3) damages. Each of these was abandoned by Plaintiffs at a certain point in the proceedings only to be revived later. The history of Plaintiffs' waverings is crucial to an understanding of the various court rulings in this litigation since different judicial opinions were based on different concessions which Plaintiffs made. Plaintiffs' attempts to resurrect issues

previously conceded also make this case ill-suited for review by certiorari.

1. Admission By Plaintiffs In 1971 That Their Request For Injunctive Relief Was Moot.

Plaintiffs in 1970 requested injunctive relief to prevent Defendants from continuing certain newspaper advertising. In 1971, Defendants moved to stay the case (on the doctrine of primary jurisdiction) in order to obtain a ruling from the Federal Home Loan Bank Board on the propriety of the advertising under Board rules. (R. 195.)* Plaintiffs stated that they expected an agency decision favorable to Defendants (R. 1082) in a lengthy brief opposing referral. (R. 1064-1096.) When the motion was nevertheless granted by the District Court, Plaintiffs sought to have an interlocutory appeal certified under 28 U.S.C. §1292(b) because Plaintiffs thought the issue was of such importance. (R. 447-448.) The §1292(b) motion was denied, as was a motion for reconsideration. (R. 637.) Among other things, the District Court held that a federal judge would give weight to a Board ruling in this case. (R. 435-441.)

Plaintiffs finally prevailed on this point, however. They persuaded the Board to hold, contrary to the District Court, that the matter was not suitable for agency review. They did this by urging in a motion for reconsideration in the District Court that the injunctive part of the case had been "mooted." (R. 446.) Relying on that motion and the af-

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* References are to the pages of the record before the Seventh Circuit (which were consecutively numbered by Plaintiffs). Some of these pages were reproduced in Appendixes filed in the Seventh Circuit. The Court need not review the record to understand the argument herein. The references are added for the sake of completeness and to permit verification if deemed necessary.

fidavit *of Plaintiffs' counsel* attached thereto, the Board stated:

> *Here, the three named defendants appear to have discontinued the advertising complained of by the plaintiffs, and there is no basis which would indicate that they intend to resume such advertising in the future.* Indeed, even the plaintiffs do not contend that the defendants' current advertising (copies of which are attached to *the affidavit of Richard H. Prins, dated March 3, 1971, in support of plaintiffs' motion for reconsideration*) is violative of the Board's advertising regulations or the Federal securities laws. . . . Accordingly, there appears to be no grounds for the Board to institute cease-and-desist proceedings for the sole purpose of determining whether the discontinued advertising which is the subject matter of the litigation may have violated the Board's advertising regulations. (A. 20, R. 483.) (Emphasis added.)

The affidavit *sworn to by Plaintiffs' counsel* and referred to by the Board stated:

> Subsequent to the filing of Plaintiffs' Answering Brief on the question of the Board's primary jurisdiction, *each of the named Defendants has reformed its dividend (interest) payment practices. . . . With these changes, it is believed that all of the activities complained of involving these Defendants over which the Board might arguably have had some authority have now been corrected. . . . As for current practices, the evils complained of have been cured. As for the past, only this Court can provide an appropriate remedy by way of damages.* Accordingly, Affiant submits that the Board does not have jurisdiction herein and a reference to the Board would therefore be futile. (R. 451-452.) (Emphasis added.)

Not until 1975 did Plaintiffs attempt to revive their request for injunctive relief (in an attempt to prevent dismissal of the case for mootness). They alleged no change

in circumstances between 1971 and 1975 and the Seventh Circuit rejected Plaintiffs' attempted resurrection of this issue. (See Pet. Cert. A-7.) In the Petition for Certiorari Plaintiffs again abandon any claim for injunctive relief. Nevertheless, an understanding of the history of this issue is relevant to section 3 of the supplemental facts, discussed at pages 6-7, below.

2. Admission By Plaintiffs In 1973 That They Were Not Entitled To Attorney Fees.

In their petition, Plaintiffs seek an award of attorney fees. However, in a prior petition for certiorari which Plaintiffs filed in this same litigation in 1973, Plaintiffs argued as follows:

> Except for §§9 and 18, the Securities Exchange Act of 1934 does not (unlike the Securities Act of 1933 or the Clayton Act) provide for statutory imposition of attorneys' fees . . . . *Since the case at bar is based upon §10(b) of the Exchange Act no attorneys' fees can be expected in the event plaintiffs are successful in their individual action.*
>
> Neither plaintiffs nor their attorneys are willing to prosecute this $12 case unless the potential of class recovery is dangled as the carrot so that the plaintiffs can hope to recoup their costs and expenses and their attorneys can reasonably expend the time and effort which is needed to successfully prosecute the matter. . . .
>
> Hence, if the plaintiff class order is not appealable then, upon trial, the lower court will, of course, enter a judgment for defendants. This will properly be so since plaintiffs will not have presented their case. (R. 751-752. Citations omitted. Emphasis added.)

Following dismissal of their 1973 appeal, Plaintiffs reversed their position on attorney fees. In their brief opposing Defendant's motion to dismiss for mootness, Plain-

tiffs revived their claim for attorney fees relying on *Wilderness Society* v. *Morton,* 495 F.2d 1026 (D.C. Cir. 1974). (R. 824.) They devoted less than one page to the point. (R. 824-825.) Then *Wilderness Society* was reversed. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). After that reversal, Plaintiffs expanded their argument for attorney fees to four pages (on the second appeal). (Pl. Br. 60-63.)

To support their new position, Plaintiffs charged in their second appeal (for the first time) that Defendants acted "vexatiously or oppressively in untenably defending a case." (Pl. Br. 63.) No pleading or brief filed before the District Court in the five years the case had been pending ever charged Defendants' counsel with such conduct. The Plaintiffs never presented any evidence and the District Court never issued any opinion on that issue on which Plaintiffs nevertheless sought "review." Defendants' appellate brief pointed out that the prior ten rulings by federal judges had all adopted the allegedly "untenable" positions urged by Defendants. The Seventh Circuit found "no possible basis" for Plaintiffs' charge and rejected Plaintiffs' position in a sentence. (Pet. Cert. A-8.)

Plaintiffs now abandon their claim of "untenably defending" and urge that the *Alyeska Pipeline* decision is "in no way inconsistent" with Plaintiffs' request for fees. (Pet. Cert. 25.) Having come full circle, they now urge the position they previously described as meritless.

3. Admission By Plaintiffs In 1975 That Their Individual Damage Claims Were Moot.

A similar pattern of taking both sides of the issue occurred with regard to Plaintiffs' damage claims. In Plaintiffs' memorandum opposing Defendants' motion to dismiss the case as moot, Plaintiffs had this to say about their individual damage claims:

> If . . . only monetary claims of the named plaintiffs were involved in this litigation there could hardly be much doubt that the tender by defendants for the full amount of plaintiffs' claims would be sufficient to moot the cause and warrant dismissal under Rule 12, F.R.C.P., for there would then be no case or controversy within the meaning of Article III of the Constitution. (R. 818.)

Defendants' reply memorandum quoted the above and then stated: "The first page of plaintiffs' Memorandum concedes our central contention." (R. 866.)

The only discussion of the point in the District Court's opinion was: "Defendants assert, and plaintiffs concede, that defendants have tendered to plaintiffs the claimed damages ($12 per plaintiff) and costs . . .." Pet. Cert. A-16. Like the parties, the District Court treated the individual damage claims as an uncontested issue.

On appeal, Plaintiffs' opening brief had a lengthy argument section (pages 19-71) covering three issues, including the issue of mootness (pages 56-63). The mootness argument was divided into two arguments:

A. The District Court Erroneously And Without An Evidentiary Hearing Determined That The *Injunctive Relief* Sought By Plaintiffs Was Moot.

B. Plaintiffs' Counsel Are Entitled To *Attorneys' Fees* Despite Absence Of Class Action Treatment And Thus The Cause Was Not Moot. (Pl. Br. ii, 56-63. Emphasis added.)

In other words, in a lengthy appellate brief, plaintiffs explicitly contested dismissal of *only two* of their original three requests for relief: the requests for injunctive relief and attorney fees. Plaintiffs did *not* even discuss their indi-

vidual damage claims. Since plaintiffs did not, neither did defendants except to say: "Plaintiffs concede that their individual damage claims are moot." (Def. Br. 36.) This was never disputed.

Since the parties had not argued the point, the Seventh Circuit simply observed that:

> Plaintiffs do not challenge the adequacy of the amount tendered by defendants to cover their individual losses, and court costs. A favorable decision on the merits will bring them no greater amount of money. (Pet. Cert. A-6.)

The Seventh Circuit did not further discuss the point, which was understandable since it had not been argued. Having lost the appeal, Plaintiffs again changed tack and argued for the *first* time in a petition for rehearing that their individual claims for damages were not mooted.

In brief: (1) Plaintiffs' claim for injunctive relief—which they described as "mooted" in 1971 to prevent an agency referral of the case—was revived in 1975 in an attempt to prevent dismissal of the entire case for mootness. (2) Plaintiffs' claim for attorney fees—which they characterized as meritless in 1973 in an attempt to prevent dismissal of their first appeal—was revived in 1975 in an attempt to prevent dismissal of the whole case. (3) Plaintiffs admitted their claims for individual damages were "moot" in 1975. Both the District Court and the Court of Appeals relied on that admission. But Plaintiffs then retracted their admission in a petition for rehearing and for the first time sought to contest the issue.

Now, in the instant petition for certiorari, Plaintiffs try a new combination of ingredients: they omit discussion of their request for an injunction and brief only their requests for damages and fees. That petition should be denied for the three reasons set out below.

ARGUMENT

I. THE ARGUMENT PLAINTIFFS FIRST MADE IN THEIR APPELLATE PETITION FOR REHEARING IN CONTRADICTION OF THEIR EARLIER EXPRESS CONCESSION SHOULD NOT BE CONSIDERED VIA CERTIORARI.

Plaintiffs' first two "questions presented for review" are really one: Were Plaintiffs' individual damage claims rendered moot when they were paid in full? This point was conceded by Plaintiffs and therefore not considered either by the District Court or the Seventh Circuit. Accordingly, the case comes here upon a truncated record without having been fully briefed or discussed by any lawyer or Judge. That alone is a reason to refuse certiorari.

Moreover, even if the Court disagreed with the grounds given by the Seventh Circuit, either the Court or the Seventh Circuit (on remand) should nevertheless affirm the District Court under Rule 28, F.R.A.P. See, *e.g.*, *United States* v. *White*, 454 F.2d 435, 439 (7th Cir. 1971):

> Finally, we decide not to resolve the issue . . . since it is not properly before us. That issue was neither raised nor decided on the original appeal, has never been briefed and was argued orally for the first time in the *en banc* hearing. Rule 28 of the Federal Rules of Appellate Procedu , (28 U.S.C. Rules) has been interpreted to require that all issues be set out in the appellant's brief and the respondent's answer, and failure to comply may constitute a waiver. [Citing cases.]

Even if an argument is first made in a reply brief, prior to the decision of the Court of Appeals, the argument should not be considered because not properly and timely

raised. *United States* v. *Michigan Carton Co.*, 552 F.2d 198, 201 (7th Cir. 1977):

> [A particular] contention . . . raises a fresh issue in the case which is outside the proper scope of a reply brief under Rule 9(e) of this court. . . . We therefore do not address the argument.

This case is far stronger than those cited above. Here mootness of the request for individual damages was not merely overlooked on appeal. It was explicitly waived before the District Court. It is black-letter law in the Seventh Circuit that a matter waived before a district court cannot be raised on appeal, let alone on a petition for rehearing. *Cannon* v. *U.S. Acoustics Corp.*, 532 F.2d 1118, 1119 (7th Cir. 1976); *Allen* v. *Beneficial Finance Co. of Gary, Inc.*, 531 F.2d 797, 805 (7th Cir. 1967) (even constitutional issues not raised in district court will not be reviewed on appeal); *Hamilton Die Cast, Inc.* v. *United States Fidelity And Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975); *Mark* v. *McDonnell & Co., Inc.*, 447 F.2d 847, 849 (7th Cir. 1971); *King* v. *Stevenson*, 445 F.2d 565, 570-571 (7th Cir. 1971) (issue included in pleadings but not pressed in district court will not be reviewed on appeal). Thus, rejecting the Seventh Circuit's opinion and remanding the case to the Seventh Circuit for further proceedings would produce no different result for the litigants before the Court.

Further, the cases cited above express a policy just as relevant to denying petitions for certiorari as to denying petitions for rehearing. Courts should require that issues be timely presented, both for efficiency and fairness. Had Plaintiffs raised an additional point before the District Court, Defendants could have filed affidavits, taken discovery, made different arguments or otherwise taken action to have the matter presented fully. It is unfair to remand the case and require court and counsel to start

over. Counsel should not be allowed to lay in the weeds, pressing a particular theory before the District Court and holding back another theory to attempt to obtain a reversal if the preferred theory is not successful. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1957) ("Only in exceptional cases will this Court review a question not raised in the court below.") *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1966) ("We see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals"). (In both *Lawn* and *Neely*, the petitioner also omitted the issue from the petition for certiorari and the Court relied on the combined omission in refusing to consider the issue.)

Plaintiffs have had their day in court. Indeed, they have had twelve different decisions by three district court judges, two appellate panels, one *en banc* panel, the Court, and a federal agency, extending over a period of almost eight years. Plaintiffs had an opportunity to make every argument they wished to make. (Indeed, they have argued both sides of most of the issues.) To remand this case now for yet another round of opinions is to ride roughshod over Defendants' rights to have litigation against them cease at some point. Plaintiffs obviously deliberated on the positions they maintained in this case. When they decided not to contest the mootness of their individual damage claims, that decision was final. They cannot change their minds because they lost their appeal.

II. THE PORTIONS OF THE SEVENTH CIRCUIT OPINION ATTACKED BY PLAINTIFFS ARE MERE DICTA HERE; EVEN APART FROM SUCH DICTA, THE INSTANT CASE IS CLEARLY MOOT. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Plaintiffs' quarrel with the Seventh Circuit's decision in this case is directed not to the court's holding but rather

to a set of "generalizations" contained in dicta at the end of Chief Judge Fairchild's opinion. Specifically, Plaintiffs contend that, if "proposition 2" were followed, a defendant might be able to moot a case before the plaintiff could obtain a District Court determination of class status. That argument has nothing to do with the present case.

The complaint in this litigation was filed in 1970. The class allegations were dismissed in 1972 after extensive briefing. Subsequently, Plaintiffs moved to amend the District Court's dismissal of the class allegations and also sought an appeal. It was not until 1975 that Defendants moved to dismiss the case as moot. Plaintiffs here obtained the District Court's full consideration of the class issue but lost the decision on their class claim. Accordingly, even without the "generalizations" in the Seventh Circuit opinion, *Indianapolis School Commissioners* v. *Jacobs,* 420 U.S. 128, 129 (1975) would require dismissal of this case as moot:

> The case is . . . *moot unless it was duly certified* as a class action pursuant to Fed. Rule Civ. Proc. 23 [prior to the mooting of the class representative's claims. 420 U.S. at 129. Emphasis added.]

The District Court did not "duly certify" any class in this case. Thus, *this case* is moot even if the Seventh Circuit's dicta might be wrong as to cases where there has been no prior ruling on the class action issue.

To the same effect as *Jacobs* are *O'Shea* v. *Littleton,* 414 U.S. 488, 494-495 (1974) and *Hall* v. *Beals,* 396 U.S. 45 (1969). Contrast *Sosna* v. *Iowa,* 419 U.S. 393, 399 (1975):

> If appellant had sued only on her own behalf, [the facts of the case] woud make this case moot and require dismissal. . . . But appellant brought this suit as a class action . . . . *When the District Court certified the propriety of the class action,* the class of unnamed persons described in the certification acquired

> a legal status separate from the interest asserted by appellant. (Emphasis added.)

See also 419 U.S. at 401: "Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons *she has been certified to represent.*" (Emphasis added.) By contrast, Plaintiffs in this case do not represent anyone else. A decision denying class status and dismissing class allegations totally strips the litigation of its class action character. *Pearson* v. *Ecological Science Corp.,* 522 F.2d 171, 176-178 (5th Cir. 1975).

The *holding* of the Seventh Circuit is mandated by the foregoing recent cases of the Court. Plaintiffs do not gainsay that fact; they merely quibble with *dicta* discussing situations in which there is *not* a prior ruling on the class issues. Even if Plaintiffs' quibble were correct, *this case* would be decided in the same way.

Certiorari is not a device for resolving quibbles or for obtaining advisory opinions on issues which are not before the Court. Plaintiffs' efforts to concoct a "conflict between the Circuits" does not alter the inappropriateness of their request. None of the three cases cited by Plaintiffs as being in "conflict" with the Seventh Circuit's decision arose in circumstances analogous to the present case.

For example, in *Weathers* v. *Peters Realty Corp.,* 499 F. 2d 1197 (6th Cir. 1974) the District Court erred by blurring together the denial of class status with a decision against the named plaintiff on the merits. The Sixth Circuit *reversed* the decision on the merits as being unsupported by the evidence. Since there had not been a decision on the class issue independent of the erroneous decision on the merits, a remand of the class issue was in order—indeed, following the reversal it is hard to see how the plaintiff's claims could have been "moot."

Similarly, in *Workman* v. *Mitchell*, 502 F.2d 1201 (9th Cir. 1974), the District Court denied class certification *solely* because it did not believe a class was necessary to protect the interests of the prison population on behalf of whom suit was brought. The Sixth Circuit found that judgment unwarranted in light of actual events and certified the class. Significantly, the Sixth Circuit did not even reach the question of whether the named plaintiffs' claims were moot or not. 502 F.2d at 1207.

And finally, the Fifth Circuit's decision in *Satterwhite* v. *City of Greenville, Texas*, 557 F.2d 414 (5th Cir. 1977), echoing concerns in *Weathers* and *Workman*, rests on the unique nature of civil rights discrimination cases. The court described these cases as being "'perforce' class actions" because they necessarily challenge defendant's behavior toward a specific group of persons. 557 F.2d at 419.

None of these three cases can be meaningfully said to "conflict" with the Seventh Circuit decision in the instant case.

III. PLAINTIFFS' CLAIM FOR ATTORNEY FEES LACKS MERIT.

Plaintiffs' third "question presented" concerns their counsels' supposed right to receive fees from Defendants. This argument founders on two grounds.

A. Plaintiffs Are "Judicially Estopped" To Contradict Their Position Taken On The First Appeal In This Case.

In their first appeal in this case in 1973, Plaintiffs' counsel argued that they could not possibly receive fees without a class action certification (which was refused). (R. 751-752.) Plaintiffs are "judicially estopped" to take a

different position now than they took in their first appeal in this same case. *Jett* v. *Zink*, 474 F.2d 149, 154-155 (5th Cir. 1973), *cert. den.* 414 U.S. 854 (1973):

> To dispose of this . . . contention we need only look to the first appeal in this case and to the assertions of the parties before the court at that time. . . . *Sterling Oil has argued one position before this court and now, after obtaining the benefit of that position, has advanced an admittedly inconsistent position in hopes of prevailing again. We hold that it is precluded from utilizing such a tactic.* (Emphasis added.)

The policies underlying the doctrine of judicial estoppel were cogently explained in *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953):

> Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate. [Citation omitted.] And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

Accord: *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513 (1953) (alternate ground): "The appellant cannot blow hot and cold and take now a position contrary to that taken in [previous] proceedings . . . ." See IB Moore FEDERAL PRACTICE ¶0.405[8]; Note, "The Doctrine of Preclusion Against Inconsistent Positions In Judicial Proceedings," 59 Harv. L. Rev. 1132 (1946).

B. Plaintiffs Cannot Obtain Fees From Defendants On The "Common Benefit" Theory They Urge.

In any event, plaintiffs' claim for attorney fees lacks merit. The cases they cite involve attorneys who conferred benefits on a class of absent parties and who therefore

received fees *not from the defendants, but from the absent benefited parties.* For example, in *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 167 (1939), the Court awarded plaintiffs' counsel fees out of the fund created for plaintiffs and those similarly situated because "when . . . a fund is . . . created for the benefit of others . . . [there is] the power of equity [to award fees] in doing justice *as between a party and the beneficiaries of his litigation.*" (Emphasis added.) Even where an attorney confers a benefit on a class, the *Sprague* case recognized that "allowances [of fees] are appropriate only in exceptional cases and for dominating reasons of justice." 307 U.S. at 167.

In *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the *Sprague* rule was applied to require a corporation to pay the fee of an attorney who benefited the class of the corporation's shareholders. The Court made it clear that the corporation was required to pay plaintiffs' counsel's fees not in its capacity as defendant, but in its capacity as a representative of (and conduit from) the absent benefited shareholders. 396 U.S. at 392-396. Since there was no monetary award from which to subtract a fee in *Mills,* the payment of the fee by the corporation was the only fair and feasible means of having the shareholders compensate the counsel. The Court explained that the basis for the fee award was that:

> . . . the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation . . . . (*Id.* 394.)

The Court in *Mills* noted the narrowness of the rule it applied and reaffirmed that "the general American rule [is] . . . attorneys' fees are not ordinarily recoverable . . . ." 396 U.S. at 391. Accord, 6 Moore, FEDERAL PRACTICE, ¶54.77[2].

CONCLUSION

Out of simple fairness, Defendants, who have been found right twelve times, should not be forced to pay for a thirteenth battle in this seven-year lawyers' war.* Especially they should not have to debate an issue which was first raised in a petition for rehearing after previously having been expressly waived. Such a debate would serve no purpose when there are numerous other grounds for affirmance and the issue involves only *dicta.*

If Plaintiffs are correct that the issues they seek to debate have arisen many times and will arise again many times, surely there will be cases far better suited to consideration by the Court than this one presenting such issues.

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* If this case is remanded for further proceedings on the class issue, it will be necessary to determine the impact of the Seventh Circuit's recent decision in *Susman* v. *Lincoln American Corp.,* 561 F.2d 86 (7th Cir. 1977). In *Susman* and a companion case, the Seventh Circuit upheld the denial of class action status in two cases in which two of Plaintiffs' attorneys in the present case were involved. In both cases, the District Court found that close relationships between the named plaintiffs and the attorney who would represent the class precluded adequate representation of the class. Discovery suggests that a similar situation may be present here. Additional discovery on the point would be required.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1020

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ, et al.,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

REPLY TO BRIEF OF HOME FEDERAL SAVINGS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF OF HOME FEDERAL SAVINGS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Brief in Opposition filed by Home Federal Savings points up the appropriateness of the Court taking this case in order to decide the issues presented. The question as to whether voluntary payment to the putative class representa-

tive by a defendant can moot a class action and thereby insulate from appellate review the trial court's order denying class status is clearly and simply presented—and, as set forth below, Respondent Home's argument makes that very point.*

I.

As to the argument that Petitioners concern themselves with mere dicta in the opinion below, Respondent Home's brief assists Petitioners' argument. Respondent Home argues (pp. 12-13) that, once the district court has denied class status, only an individual action is then involved, and, since "[p]laintiffs in this case do not represent anyone else," the defendants are therefore entitled to pay off the named plaintiffs and moot the entire case, thereby foreclosing appellate review of any class action ruling. But that contention points up the sharpness of the issue and emphasizes the fact that Petitioners do not rely on dicta, but are affected by the square holding of the case. It is Petitioners' position that they do represent someone else—the unnamed class members—and that the courts do have jurisdiction to determine whether they do or do not represent that class. This, at the very least, is the issue remaining at large between the parties. It is this issue which the Seventh Circuit's opinion specifically and directly held it had no jurisdiction to decide—hardly a matter of dicta.

Thus, seemingly agreeing with Petitioners that the Seventh Circuit was wrong, Respondent Home at p. 12 states:

> "The District Court did not 'duly certify' any class in this case. Thus, *this case* is moot even if the Seventh

* Respondents Bell Federal Savings and Uptown Federal Savings have not responded to the Petition.

> Circuit's dicta might be wrong as to cases where there has been no prior ruling on the class action issue." (emphasis in original)

Then, after quoting from this Court's opinion in *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), Respondent at p. 13 goes on to assert:

> "By contrast, Plaintiffs in this case do not represent anyone else. A decision denying class status and dismissing class allegations totally strips the litigation of its class action character."

If the district court's denial of class status were correct, then Respondent's conclusion may be valid. Having received all the relief as to which they are entitled, Petitioners can certainly understand the position that there then remains no case or controversy. But if the district court was in error, then Respondent's conclusion is incorrect. Plaintiffs, in that event, do represent a class whose members have live interests still before the court, notwithstanding the satisfaction of the named plaintiffs' individual $12 claims.

The threshold question presented to this Court is whether the district court's denial of class status can be immunized from judicial review by the simple voluntary action of the defendants in paying off the named plaintiffs before a reviewing court has the opportunity to rule. The Court of Appeals held that the defendants could do this, and accordingly dismissed the appeal. This is the square holding of the court below. In no sense is it dicta and its effect is to do away with the class action in the Circuit.

Further, the Seventh Circuit certainly *thought* that the alleged rule of law embodied in Proposition 2 (which Home urges is mere dicta) was the very foundation for its holding of mootness. Surely Proposition 2 and its companion propo-

sitions enumerated by the court below are the carefully considered products of that court's reasoning, and not simply casual comments thoughtlessly tossed out in passing. Proposition 2, whether characterized as dicta or holding, will have (and already is having) a fatally chilling effect upon class actions pending in the Seventh Circuit, as argued at pp. 14-15 of the Petition for Certiorari. Whether or not Home believes Proposition 2 to be dicta, the district courts consider it to be the law in the Seventh Circuit.

II.

Assuming, *arguendo,* that all that this Respondent asserts is correct, there is presented a case in which the named plaintiffs are not entitled to (i) injunctive relief (the practices complained of having been corrected), (ii) money damages (the defendants having tendered all the monetary relief to which the individual plaintiffs are entitled), and (iii) attorneys' fees (the law does not permit such reimbursement). Thus, the only matters plainly remaining at large are the class action issues—questions which, according to the Seventh Circuit, neither the district court nor the appellate court has jurisdiction to decide. A simpler, more direct presentation of the issue can hardly be imagined.

Respondent Home argues as though the issue before the Court is whether plaintiffs' individual damage claims are moot (Home Br. p. 9). The central issue, however, is whether, when a defendant voluntarily attempts tender of those individual damages, the Court of Appeals is deprived of jurisdiction to review denials of class status.

III.

Respondent Home Federal would have this Court believe that the Seventh Circuit's determination that it had no jurisdiction to decide the class action questions was based upon certain "admissions" allegedly made by plaintiffs during the course of proceedings in the trial court, rather than upon the grounds actually set forth in the opinion below. In particular, Respondent quotes (at p. 7) the following statement made by plaintiffs: "Defendants assert, and plaintiffs concede, that defendants have tendered to plaintiffs the claimed damages ($12 per plaintiff) and costs . . . ." These Petitioners do indeed concede that their *individual* monetary damages are no greater than $12 each. (Petition p. 6). That, however, is not the point at issue.

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